40/918

IN THE DISTRICT COURT OF THE ELEVENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF FLATHEAD

No. DV-79-425

BOARD OF TRUSTEES OF SCHOOL DISTRICT NO. 38, FLATHEAD AND LAKE COUNTIES, MONTANA,

Plaintiff,

and

THE BOARD OF PERSONNEL APPEALS AND THE BIGFORK AREA EDUCATION ASSOCIATION,

Defendants.

JUDGMENT

FILED May 29 1980
JOHN VAN
Clerk of the District Court
By Kathy L Lynch
Deputy Clerk

* * * * * * * * * * * * * * * * * *

The matter of Judicial Review of the final order dated July 20, 1979, of the Board of Personnel Appeals, Department of Labor and Industry, State of Montana, having come on regularly before this Court, and briefs having been submitted and filed by Plaintiff Board of Trustees of School District No. 38 of Flathead and Lake Counties, Montana, and by Defendant Board of Personnel Appeals and by Defendant Bigfork Area Education Association, and the Court having carefully examined same as well as the transcript and other documents and exhibits filed in the case; and

THIS COURT FINDING:

1. That the Administrative Findings, Conclusions and Order of the Defendant Board of Personnel Appeals are:

(a) Not in violation of constitutional or statutory provisions;

(b) Not in excess of the statutory authority of the agency;

(c) Not made upon unlawful procedure;

(d) Not affected by other error of law;

(e) Not clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

(f) Not arbitrary or capricious or characterized by abuse of discretion nor clearly unwarranted exercise of discretion;

2. That no substantial rights of Plaintiff have been prejudiced.

WHEREFORE, by virtue of the foregoing and the statutory requirement that this Court not substitute its judgment as to the weight of the evidence on questions of fact, this

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Court concludes that there is substantial evidence on the whole record to support the aforesaid findings, conclusion, and final order of the State Board of Personnel Appeals, and therefore, the aforesaid findings, conclusion and order are hereby affirmed.

DATED this 28th day of May, 1980.

J. M. [signature]

DISTRICT JUDGE

I hereby certify that I have mailed a true copy of the document to:
[handwritten names]
Board of Personnel Appeals
by depositing same in the U. S. Mail this 29 day of May, 19 80
JOHN VAN
Clerk of the District Court
By Kathy J. [signature] Deputy Clerk

BEFORE THE BOARD OF PERSONNEL APPEALS
OF THE STATE OF MONTANA

In the Matter of Unfair Labor Practice Charges #20, 22, 25, 26, and 33, 1978: Bigfork Area Education Association, Complainant, vs. Board of Trustees, Flathead and Lake County School District #38, Defendant.	FINAL ORDER

* *

The Findings of Fact, Conclusions of Law, and Recommended Order were issued on April 30, 1979, by Hearing Examiner, Rick D'Hooge.

Exceptions of Defendant were filed by Mr. Leonard W. York on behalf of the Defendant.

After reviewing the record and considering the briefs and oral arguments, the Board orders as follows:

1. IT IS ORDERED, that the Exceptions of Defendant to the Findings of Fact, Conclusions of Law, and Recommended Order filed by Mr. Leonard W. York are hereby denied.

2. IT IS ORDERED, that this Board therefore adopts the Findings of Fact, Conclusions of Law, and Recommended Order of Hearing Examiner, Rick D'Hooge as the Final Order of this Board.

DATED this 20th day of July, 1979.

BOARD OF PERSONNEL APPEALS

By _____
Brent Cromley, Chairman

LEG3:j

BEFORE THE BOARD OF PERSONNEL APPEALS

OF THE STATE OF MONTANA

In the Matter of Unfair Labor Practice Charges #20, 22, 25, 26 and 33, 1978: Bigfork Area Education Association,	
Complainant,	
vs.	
Board of Trustees, Flathead and Lake County School District #38,	
Defendant.	

* *

FINDINGS OF FACTS, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER

* *

I. INTRODUCTION

The Bigfork Area Education Association (herein BAEA or BFEA) has charged the Board of Trustees, Flathead and Lake County School District #38 (herein School District) with improperly issuing individual teaching contracts (ULP #20-1978, count I), bypassing the exclusive bargaining agent (ULP #20-1978, count II), conditional bargaining (ULP #22-1978, count I), improperly calling impasse (ULP #22-1978, count II), withdrawal of recognition and refusing to bargain (ULP #25-1978), recognizing and bargaining with the Bigfork Teachers Association (herein BTA) (ULP #26-1978), and making unilateral changes in working conditions (ULP #33-1978).

This RECOMMENDED ORDER is divided into the major areas of I. Introduction, II. Stipulations, Administrative Note and Motions, III. Findings of Fact, IV. Charges, Discussion and Conclusion of Law, V. Remedy, and VI. Recommended Order.

Because the Board of Personnel Appeals has very little precedent in some areas, I will cite federal statutes and cases for guidance in the application of Montana's Collective

Bargaining Act, Title 39, Chapter 31, MCA (ACT). The Federal Statutes will generally be the National Labor Relations Act, 29 USCA, Sections 151-166 (NLRA). The Montana Supreme Court in State Department of Highways vs. Public Employee Craft Council, 165 Mont. 249, 529 P 2d 785 at 787 (1974) approved this principle:

> When legislation has been judicially construed and a subsequent statute on the same or an analogous subject is framed in the identical language, it will ordinarily be presumed that the Legislature intended that the language as used in the later enactment would be given a like interpretation. This role is applicable to state statutes which are patterned after federal statutes. [Citing cases] Although the cases which have interpreted the italicised words involved private employees, the act before us incorporates the exact language, consisting of 16 words, found in the earlier statutes, and it is unlikely that the same words would have been repeated without any qualification in a later statute in the absence of an intent that they be given the construction previously adopted by the courts.
>
> We think similar standards of judicial construction apply in the present case. For example, section 19-102, R.C.M., 1947 [Section 1-2-106 MCA] provides:
>
> "Words and phrases used in the codes or other statutes of Montana are construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, as amended, are to be construed according to such peculiar and appropriate meaning or definition [Emphasis added].

The question of what constitutes substantial evidence has been addressed by the Montana Supreme Court, as illustrated by the following quotation from Olson v. West Fork Properties, Inc., _____ Mont. _____, 557 P.2d 821 (1976):

> Substantial evidence has been defined by this Court as such as will convince reasonable men and on which such may not reasonably differ as to whether it establishes the plaintiff's case, and if all reasonable men must conclude that evidence does not establish such case, then it is not substantial evidence. The evidence may be inherently weak and still be deemed "substantial," and one witness may be sufficient to establish the preponderance of a case. See: Staggers v. U.S.F. & G. Co., 159 Mont. 254, 496 P.2d 1161; Greene v. Knapp's Service, 161 Mont. 438, 440, 506 P.2d 1381 [emphasis added].

This RECOMMENDED ORDER will use the above when considering the evidence.

II. STIPULATIONS, ADMINISTRATIVE NOTE AND MOTIONS

1. The following stipulations were entered into at the hearing held October 25 and 26, 1978 concerning Unfair Labor Practice Charges (ULP) #20, 22, 25 and 26, 1978:

a. The Board of Personnel Appeals has jurisdiction in the charges as defined by 39-31-406 MCA. (Tr2).

b. The Board of Trustees, Flathead and Lake County School District #38 is a public employer as defined by 39-31-103 Subsection 1 MCA. (Tr2).

c. The teachers of the Board of Trustees of Flathead and Lake County School District #38 are public employees as defined by 39-31-103 Subsection 2 MCA. (Tr2).

d. Bigfork Area Education Association affiliated with the Montana Education Association is a Labor Organization as defined by 39-31-103 Subsection 5 MCA. (Tr3).

e. A correction of a typographical error in Unfair Labor Practice Charge #20-78, Count II, Line 1 and Line 10 should read 1978 not 1968 as typed. (Tr3).

f. Joint Exhibit 1, a Collective Bargaining Labor agreement between the Complaintant and the Defendant effective from July 1, 1976 to June 30, 1978, is entered into the record. (Tr3).

g. The first briefs will be simultaneously submitted and exchanged thirty calendar days following the receipt of the transcript of this hearing. Reply briefs will be simultaneously submitted and exchanged 15 days later. (Tr236).

2. The parties stipulated in regard to Unfair Labor Practice Charge #33-78 as follows:

> It is hereby stipulated by the parties hereto that the final decision of the Board of Personnel Appeals as to whether or not an impasse existed under the facts and circumstances as presented in ULP #22-1978 may be deemed controlling on the question of whether or not impasse existed on August 31, 1978, as alleged in Defendant's answer to the charge in the above entitled matter [ULP #33-78].
>
> DATED this 25 day of January, 1979.

The Board of Personnel Appeals entered the following order for Procedure for Unfair Labor Practice Charge #33-78:

> In light of the attached [Above] stipulation, IT IS HEREBY ORDERED that the following procedures be followed:
>
> 1. A recommended ruling in ULP #33-78 will be contained within the recommended ruling on ULP #20, 22, 25 and 26, 1978.

2. The ruling in ULP #33-78 will be based on the record and supporting briefs of the hearing held on October 25, and 26, 1978, plus the agreed to facts that the defendant did make unilateral changes in working conditions on or after August 31, 1978.

3. If the Board's Final Order in ULP #33-78 finds a valid charge, the parties, within 30 calendar days, will attempt to reach an agreement on any possible remedy required by the unilateral changes in working conditions or related activities, and the Board Order.

4. If the parties are unable to reach an agreement on the remedy, the question of remedy will be referred to the Administrator of the Board of Personnel Appeals for further assignment and proposed remedy order.

DATED this 7th day of February, 1979.

3. At the hearing, Administrative Note was taken of both the Bigfork Teacher Association's Petition for Decertification (DC#5-78) of the Bigfork Area Education Association as the exclusive bargaining representative for the Bigfork teachers and employer's (Defendants) petition alleging that one or more labor organizations has presented a claim to be recognized as the exclusive representative. (Tr143).

4. At the hearing, the representative of the Defendant submitted the following motion:

COMES NOW, the Defendant, Board of Trustees, Flathead and Lake County School District #38, and respectfully moves the Board of Personnel Appeals dismiss the complaint [in ULP 26-78] of the Bigfork Education Association on the grounds and for the reasons that the complaint as filed herein and served on Defendant does not state a cause upon which relief can be granted; and, for the further grounds and reasons [lack of clarity], set-out in the Defendant's Memorandum Brief In Support Of Motion To Dismiss, appended hereto.

Respectfully submitted this 25th day of October, 1978, at Bigfork, Montana.

The Defendants notion to dismiss ULP #26-78 is granted on Count I because the complaint is set forth in a more concise charge contained in ULP #20, 22, and 25, 1978 which is considered by this recommeded order. This dismissal of ULP #26-78, Count I is limited to material outside of the charges setforth in ULP

#20, 22, 25 and 26, 1978. It is ordered that materials outside of the charges in ULP #20, 22, 25 and 26, 1978 will not be considered when drafting the conclusion of law in the above unfair labor practice charges. The Defendant's Motion to dismiss is not granted in Count II of ULP #26-78 because the complaint contains a clear charge which the Defendant can understand. A Review of the Defendant's answer in ULP #26-78, Count II further demonstrates the Defendant's clear understanding of the allegations.

5. At the beginning of the hearing, the Complainant's attorney submitted a demand upon the representative of the School District for proof of his authority to represent the Defendant. Section 20-1-204 MCA sets forth the following:

> Upon request of the county superintendent or the trustees of any school district or community college district, the county attorney shall be their legal adviser and shall prosecute and defend all suits to which such persons, in their capacity as public officials, may be a party; however, the trustees of any school district or community college district may, upon consent of the county attorney, employ any other attorney licensed in Montana to perform any legal services in connection with school or community college board business. (Emphasis added).

The Complainant's attorney is questioning the lack of express consent from the county attorney's offices. (Tr11). The complainant argues that if the consent of the county attorney to represent a school board is required, such consent is also necessary if a school board chooses to select a non-attorney to perform their legal services, namely trying a case before the Board of Personnel Appeals.

The issue raised by the Complainant's demand of proof is beyond the authority of this quasi-judicial board to rule on. Therefore this issue will not be addressed.

6. On January 25, 1979, the Defendant filed a motion to strike part of the Complainant's Brief and Reply Brief on the grounds that the Briefs introduced additional materials not contained in

the official stenographic report of the hearing. And further some of the materials contained in Briefs were later reported in the local newspaper. On February 1, 1979, it was ordered that the motion to strike part of the Complainant's briefs would be ruled on in this Recommended Order.

The Defendant's Motion to Strike part of the Complainant's Briefs is denied. The denial is based on the belief that a portion of or all of the questionable material is contained within the official report of the hearing, to wit:

a. A witness for the Complainant did state that the third negotiation session did take place on February 1, 1978 as stated in the Complainant's first Brief, page 10, Line 11. (Tr19, 20).

b. Exhibit C of the School District states in the upper right hand corner that the ninth negotiation session did take place on August 22, 1978 as stated in the Complainant's first Brief, page 10, Line 24.

New facts introduced in the briefs that have not been subject to or have not had an opportunity to be subject to cross examination will not be given weight in this Recommended Order. The arguments set forth in the briefs stand on their own merits.

III. FINDINGS OF FACT

After a thorough review of the briefs, exhibits, testimony, conflicting testimony and demeanor of the witnesses, I set forth the following:

1. There was a master labor contract between the BAEA and the School District for the 1976-77 and the 1977-78 school years. (Joint Exhibit 1, Tr 19). In relationship to this Recommended Order, Joint Exhibit 1 contains the following significant articles:

> Article II
> [Page A-3]
>
> RECOGNITION OF EXCLUSIVE REPRESENTATIVE
>
> Section 1. Recognition: In accordance with the Act, the school district recognizes the Bigfork Area Education Association (BAEA) as the exclusive representative of teachers employed by the school district, which exclusive representative, shall have those rights and duties as prescribed by the Act and as described in this Agreement.

Article VII
[Page A-11]

DUTY DAY

Section 1. Basic Day: The basic teacher's day, including lunch, shall be eight (8) hours.

Section 4. Duty Free Lunch: Each certified teacher grades 1 - 8 shall have a duty free period during the noon lunch and recess period of not less than 45 minutes. During this time no teacher shall be required to supervise students in the lunch room. Teachers shall be allowed to leave the school grounds, provided they have notified the office, during this duty free lunch period. Duty free recess shall be contingent upon staff providing at least 1 teacher for playground supervision for grades 4 - 8.

Section 5. Elementary Teacher Planning Time: Each teacher in one (1) through sixth (6) grade shall have one (1) hour of planning time per week. Kindergarten teacher shall have 1/2 hour per session planning time per week.

Article IX
[Page A-15]

EXTRACURRICULAR COMPENSATION

Section 1. Extracurricular Compensation: The wages and salaries reflected in Schedule B, attached hereto, shall be effective for the 1976-77 school year.

Section 2. Assignment of Extracurricular Duties: The Superintendent or his designee may assign with the teachers approval, extracurricular assignments, subject to established compensation for such services, which exceed the teaching or non-teaching services prescribed in the basic contract. Extra assignments associated with additional compensation shall not be construed to be a tenure assignment unless expressly so provided in the individual contract.

Article X
[Page A-16]

GROUP INSURANCE

Section 2. Health and Hospitalization Insurance -Coverage: The Board agrees to pay health insurance premiums for certified personnel on the following basis:

$49.63 for family coverage per month
41.50 for couples coverage per month
20.69 for singles coverage per month

Any additional costs of the premium shall be borne by the employee and paid by payroll deduction.

Article XIII
[Page A-27]

DURATION

Section 1. Duration of Agreement: This agreement shall be effective as of July 1, 1976, and shall continue in full force and effect until June 30, 1978, except salary and fringe benefits which may be reopened annually. The Association must provide to Board not later than February 1 all their wage and fringe benefit proposals. Said Agreement will automatically be renewed and will continue in force and effect for additional periods of two years unless the Association gives notice to the Board not later than February 1 prior to the aforesaid expiration date or any anniversary thereof, of its desire to reopen certain provisions of this Agreement and/or additions to this Agreement, and to negotiate over the terms of these provisions, the notice to reopen shall name these provisions.

2. On December 13, 1977, the parties entered into contract negotiations for the purpose of establishing a new master labor contract for the 1978-79 and 1979-80 school years. (BAEA Exhibit 1, Petition for mediation, Tr 19, 176).

3. The third contract negotiation session took place on February 1, 1978 with Mike Keedy, MEA UniServe Director; William L. Pederson, Chairman of the School District's Negotiating Committee; Leonard W. York, School District's labor consultant; and others present. (Tr 20, 83, 177). The session produced an agreement on the concept of a "closed" two year labor contract and the first year's compensation for those teachers who accepted extracurricular responsibilities. (Tr 20). At the end of the third session, the contract negotiations still had a number of unresolved items. (Tr 24).

The concept of a "closed" two year labor contract for the 1978-80 school year is "....that the parties would not reopen negotiations or new negotiations during the course of the 1978-79 school year." (Tr 20,15-17)

4. On February 2, 1978, Mr. Pederson presented to Mike Dockstader, BAEA's President, the School District's first full and final offer. (BAEA Exhibit 1). By attached letter, Mr.

Pederson requested Mr. Dockstader to conduct a vote of the membership to determine if the full and final offer of February 1, 1978 was acceptable to a majority. Mr. Pederson's letter contained the following statement: "In the event the Board's offer is rejected, we shall submit the matter to the State Board of Personnel Appeals for mediation, no later than Monday, February 13, 1978." (BAEA Exhibit 1, letter to Mr. Dockstader; Tr22.)

The majority of the teachers rejected the full and final offer of February 1978. (Tr 23)

5. The full and final offer of February 1978 contained the following significant articles:

Article VII
[Page A-11]

DUTY DAY

Section 1. Basic Day: The basic teacher's day including lunch, shall be seven (7) hours and forty-five (45) minutes - 8:15 A.M. to 4:00 P.M.

Section 4. DELETED.

Section 5. DELETED.

Article VIII
[Page A-12]

BASIC WAGE COMPENSATION

Section 1. Basic Compensation.

Subd. 1. 1978-79 Rates of Pay: The wages reflected in Schedule A, attached hereto, shall be effective only for the 1978-79 school year and teachers shall advance one (1) increment on the salary schedule. [Base starting Wage $9227 of a pay matrix]

Subd. 2. 1979-80 Rates of Pay: Schedule "A" wages, shall be increased by an amount of 9% of the certified teachers salaries, computed on the 1978-79 total salary amount; and, teachers shall advance one (1) increment on the salary schedule.

Article IX
[Page A-15]

EXTRACURRICULAR COMPENSATION

Section 1. Extracurricular Compensation: Certified personnel covered by this Agreement, assigned extraduty activities during the term of this Agreement, shall receive appropriate compensation for the position assigned pursuant to Schedule "B" attached hereto.

Section 2. Non-Tenure Assignment: Extra assignments associated with additional compensation shall not be construed to be a tenure assignment unless expressly so provided in the individual contract.

Article X
[Page A-16]

GROUP INSURANCE

Section 2. Health and Hospitalization Insurance Coverage: The Board agreed to pay health insurance premium for certified personnel on the following basis:

$51.23 for family coverage per month
43.16 for couples coverage per month
20.92 for singles coverage per month

Any additional cost of the premium shall be borne by the employee and paid by payroll deduction.

Article XIII
[Page A-27]

DURATION

Section 1. Duration of Agreement: This Agreement shall be effective as of July 1, 1978, and shall continue in full force and effect until June 30, 1980. Said Agreement will automatically be renewed and will continue in force and effect for additional periods of two years unless the Association gives notice to the Board not later than February 1 prior to the aforesaid expiration date or any anniversary thereof, of its desire to reopen certain provisions of this Agreement and/or additions to this Agreement, and to negotiate over the terms of these provisions, the notice shall name these provisions.
(BAEA Exhibit 1)

The full and final offer of February 1, 1978 also has attached an extra duty schedule "B".

Article XIII above and extra duty schedule "B" for the 1978-79 school year of the full and final offer of February 1, 1978 is consistent with the agreements reached on February 1, 1978. (Tr22).

6. The parties on February 13, 1978 jointly requested the assistance of a labor mediator from the Board of Personnel Appeals. (BAEA Exhibit 1).

7. State labor Mediator Linda Skaar joined the negotiation on March 21, 1978. (Tr23).

The School District's notes for the March 21, 1978 negotiation meeting reflect the following outstanding issues:

7:10 Mike Keedy presented the BFEA view on:

1. Duty free lunch period
2. Scheduled preparation time
3. Extra-curricular activities--wished voluntary rather than assigned
4. Personal leave
5. Dental insurance
6. Salary schedule for extra-duty
   The salary schedule itself is not the problem; rather the appointment versus the voluntary assignment.
7. Length of duty-day.
8. Pay schedule--not acceptable
9. Health and welfare insurance

7:20 Bill Pederson presented the Board's view on:

1. Length of duty-day
2. Personal leave
   Have emergency leave in contract now
3. Board's right to appoint extra-curricular duties
4. Group insurance
5. Duration of contract - 2 years
6. Pay schedule
   9% spread on attainment level 4 for first year. Same for second year plus the increase on the extra-duty pay schedule.

(School District 38 Exhibit A)

The School District's notes reflected agreement on the assignment of extracurricular duties:

ARTICLE IX, Section 2
[Page A-15]

First sentence as in present contract.
Change second sentence to read:

All extra assignments shall be made pursuant to a separate contract, apart from the teacher's regular academic responsibility. No teacher holding an extra assignment shall be deprived thereof in subsequent years, over his objection, without reasonable and just cause, directly and substantially related to the performance of that assignment.

Add:

In the event that the Board is unable to find a qualified teacher who is willing to accept a particular extracurricular assignment, it shall have the right to assign the same in accordance with the following conditions:

1. The Board shall first offer the proposed assignment, in writing, to no fewer than three clearly qualified and eligible employees, or such lesser number as there may be available in the school system, and obtain from each of them a rejection thereof, also in writing;

2. The Board, having complied with subsection 1 herein, shall then have the right to assign the extracurricular duty in question to an employee qualified and eligible to accept the same.

The Board's right to assign extracurricular responsibilities in accordance with subsection 2 herein shall be limited to one such assignment per employee.

S/ O.K. W.L. Pederson

S/ O.K. D.H.
(Doug Holzum, BAEA's Spokesman)

(School District 38 Exhibit A, Tr24)

The School District and the BAEA exchanged and refused the following package offers:

Board's Offer - 12:45 P.M. (BAEA REFUSED)
Package

1. Revised Section 2 of Article XI:
   Personal leave - 2 days; deduct from sick leave; only 2 employees from High and Elementary Schools (A-18 old CBA as par.)
2. Duty Day as proposed (A-11)
3. Basic Compensation, Article VIII (A-12)
4. Article IX, Extra Compensation as revised (A-15)
5. Article X, Group Insurance, as proposed (A-16)
6. Article XIII, Duration, as proposed (A-27)
7. Schedule "A" as proposed
8. Schedule "B" as proposed

* *

BAEA's Offer - 1:15 P.M. (BOARD REFUSED)

1. Duty Day - Same as present contract (A-11)
2. Personal Leave - Change "will" to "shall" and add one day Emergency Leave as in contract
3. Salary: A base of $9750 on attainment level 4 with BA+1 and BA+2 out to 12 years. Second year a 9% raise on total dollars and attached to attainment level 4.5.
4. Insurance: Board pays all increased costs
5. Drop dental proposal

(School District 38 Exhibit A)

The notes of the March 21, 1978 meeting end with an agreement "....to apply for a fact-finder as both sides are still so far from agreement on one another's proposals." (School District 38 Exhibit A)

8. Mr. Keody states that during the March 21, 1978 meeting there was no problem or reference to the concept of a "closed" two year contract and there was no change in the extra duty compensation pay. (Tr25)

9. The School District's first mill levy was rejected by the voters on April 6 or 7, 1978. (Tr200)

10. On April 17, 1978, the parties met with Fact-Finder John H. Abernathy, Ph.D., in pre-fact-finding mediation. No additional issues were agreed to at the mediation. (BAEA Exhibit 2, Tr25)

11. The fact-finding hearing took place on April 22, 1978. The issues of teacher's salaries, health & dental insurance, personal leave, length of school day, deletion of duty free lunch and deletion of elementary teacher's planning time were submitted and argued by the parties. (BAEA Exhibit 2, Tr26)

12. The issues of extra duty compensation and the concept of a "closed" two year contract were not submitted to the Fact-finder. (Tr31, 74, 75, 76, 115.)

13. On May 22, 1978, the factfinder submitted his findings and recommendations which states in part:

> The School District has proposed a base salary of $9227 and...argued that...it is within the ability of the District to pay without risking another budget levy....

(BAEA Exhibit 2, Page 5; Tr206)

In light of the above, the BAEA felt the School District was using the failure of the second mill levy as an excuse for the School District to reduce its salary offer. (Tr207, 212)

The Factfinder's report contains a "closed" two year recommendation for salaries, health insurance premium costs, personal leave, length of duty day, and the retention of duty free lunch and elementary teachers planning time. (BAEA Exhibit 2; Tr29.)

14. Shortly after receiving the report, the BAEA voted to accept the Factfinder's recommendations. (Tr29)

15. The voters rejected the School District's second mill levy on June 6, 1978. (Tr200)

16. A short seventh negotiation session took place on June 28, 1978 with the School District setting forth the reasons for non-acceptance of the factfinder's recommendations. (Tr30, 55)

The School District presented a new base salary of $9050, for the first year, requested the second year's salary be open for mid-contract negotiations, approved the first year's health insurance premium cost, requested the second year's health insurance premium cost be open for mid-contract negotiations, and stated that they could not provide duty free lunch and elementary teacher planning time along with a shorter basic duty day. Mr. Pederson explained that the new offers and the withdrawal of some of the previous offers were due to the mill levy failures. (School District 38 Exhibit B; Tr160, 161). The School District also proposed a new draft, Section 2 of Article XI. (Emergency and Personal Leave)

(RECOMMENDED DRAFT)

ARTICLE XI
SECTION 2
[Page A - 18]

SECTION 2. EMERGENCY AND PERSONAL LEAVE:

Subd. 1. A full time teacher may be granted an emergency or personal leave of no more than two (2) days per year, nonaccumulative, the day(s) used to be deducted from sick leave, for emergency or personal situations that arise requiring the teacher's personal attention which cannot be attended to when school is not in session and which are not covered under other provisions of this Agreement.

Subd. 2. Requests for emergency leave must be made in writing to the Superintendent of Schools at least three (3) days in advance, whenever possible and, the request shall state the reason for the proposed leave.

Subd. 3. Requests for personal leave must be made to the teacher's immediate supervisor with sufficient time to allow the supervisor to arrange for a substitute teacher. The District shall pay the substitute teacher and thereafter, deduct the District's rate of pay for substitute teachers from the appropriate teacher's next paycheck. This benefit is intended to be used as an entire work day at a time. Any such request made by a teacher for this benefit to the supervisor must only indicate that such leave is "for personal reasons". Only 2 teachers from high school; from junior high school; and/or, grade school, at any one time, may be allowed to request this benefit.

Subd. 4. An emergency or personal leave day shall not be granted for the day preceding or the day following holidays or vacations, and the first and last five (5) days of the school year. (School District 38 Exhibit B, Tr161, 166)

The notes of the June 28, 1978 negotiation session also state:

Bill [Pederson]: Since the mill levy has failed twice that's where we're at.

Doug [Holzum]: We are prepared to accept Factfinding (May 22, 1978) and nothing less.

Bill: We cannot accept the Association's proposal.

8:24 Recess.

8:53 Re-opened.

Leonard [York]: As explained, defeat of the mill levy makes it impossible for the Board to change their offer. If you have not changed your stand?

Mike [Keedy]: We have not.

Leonard: Then we will draft a full and final written offer and mail it to you. Will you advise the Association not to sign individual contracts? (This to Mr. Keedy)

Mike: We must reject the Board's position; and yes, I will advise them refrain from signing while negotations are still open.

9:07

Mike: I feel you should understand that we will ask the Personnel Board for help in Crisis Mediation. We do not want to go into the new school year without a contract.

Leonard: Do you intend to negotiate? Because by Doug's prior statement I gathered that you do not.

Mike: You seem to be "back-peddling" on what you have offered through-out our bargaining sessions. Now you want us to meet you half way. We can't, in good faith, bargain under those circumstnaces. No, we do not intend to yield.

Leonard: Then we seem to have reached an impasse.

Mike: I do not say that we are at an impasse, but still believe in the value of bargaining.

Leonard: Are you saying you will bargain, or are you still saying you want the Board to do the giving?

Mike: I'm saying we have not reached an impasse.

9:30 Adjourned.

(School District 38 Exhibit B)

17. In the BAEA's version of the June 28, 1978 negotiation session, Mike Keedy states that:

a. The School District was waiting for the BAEA to indicate some movement or make some movement before School District would make some offer. (Tr30, 33)

b. The factfinders recommendations were acceptable to the teachers and until the teachers saw movement from the School District, the BAEA would not make further concessions. (Tr55, 56, 58)

c. The BAEA was attempting to resume negotiations but to no avail. (Tr55)

d. The BAEA made no contract proposals. (Tr55)

e. The BAEA requested mediation with the School District refusing. (Tr31, 32, 34)

f. The School District believed impasse had been reached. The BAEA believed impasse had not been reached. (Tr31, 33)

g. When questioned about his recommendations in the event the School District issued individual teaching contracts reflecting the School District's latest full and final position, Mr. Keedy replied that he hoped the School District would not embark upon that course and individual contracts should not be issued until an agreement had been reached. (Tr56)

18. On July 10, 1978, the School District issued its second full and final offer. The second full and final offer was sent to all teachers individually. (BAEA Exhibit 6, Page 2; Tr35). The full and final offer received by Mr. Keedy on July 17, 1978 contained the following cover letter and the significant articles:

Mr. Michael Keedy
UniServ Director, Region #1
Montana Education Association
Box 1154
Kalispell, Montana 59901

Re: Bigfork Public Schools, School District No. 38, Flathead & Lake Counties, Bigfork, Montana, its "FULL AND FINAL OFFER", to Bigfork Area Education Association as a result of an IMPASSE reached in collective bargaining June 28, 1978.

Dear Mr. Keedy:

Pursuant to the discussion held with you and your collective bargaining committee on the evening of the 28th of June, 1978; and, pursuant to the Board of Trustees of the District, we hereby enclose the District's Full and Final Offer.

Briefly, the parties have exhausted all administrative procedures, i.e. mediation and fact finding, all to no avail as neither party is able or willing to concede any further. Therefore, in view of the situation, the District has prepared the Full and Final Offer and, is now respectfully

requesting that it be immediately considered for vote by the Association members no later than July 23, 1978, either to accept or reject.

Please advise the Association members that: in the event the full and final offer is rejected, then and in that event, such offer will be placed into effect July 24, 1978 for any Association member that responds to the District's offer of employment. .....

S/
William L. Pederson
Chairman, Negotiation Committee

ARTICLE VIII

BASIC COMPENSATION
[Page A-12]

Section 1. Basic Compensation:

Subd. 1. 1978-79 Rates of Pay: The wages reflected in Sechedule A, attached hereto, shall be effective only for the 1978-79 school year and teachers shall advance one (1) increment on the salary schedule. [Base starting wage $9058 of a pay matrix]

Subd. 2. 1979-80 Rates of Pay: Schedule "A" wages, shall be increased by an amount to be negotiated pursuant to Article XIII, Section 1 hereinafter setforth; and, teachers shall advance one (1) increment on the salary schedule.

ARTICLE IX

EXTRACURRICULAR COMPENSATION
[Pages A-15, A-15(a)]

Section 1. Extracurricular Compensation: Certified personnel covered by this Agreement, assigned extra-duty activities during the term of this Agreement, shall receive appropriate compensation for the position assigned pursuant to Schedule "B" attached hereto.

Section 2. Assignment of Extracurricular Duties: The Superintendent or his designee may assign with the teachers approval, extracurricular assignments, subject to established compensation for such services, which exceed the teaching or non-teaching services prescribed in the basic contract. All extra assignments shall be made pursuant to a separate contract apart from the teachers regular academic responsibility. No teacher holding an extra assignment shall be deprived thereof in subsequent years over his objection without reasonable and just cause directly and substantially related to the performance of that assignment.

In the event that the Board is unable to find a qualified teacher which would be willing to accept a particular extracurricular assignment, it shall have the right to assign the same in accordance with the following conditions:

Subd. 1.: The Board shall first offer the proposed assignment, in writing to no fewer than three fairly quali-

fied eligible employees, or such lesser number as there may be available in the school system and, obtain from each of them a rejection thereof, also in writing.

Subd. 2.: The Board having complied with Subsection 1 herein shall then have the right to assign extracurricular duties in question to an employee qualified and eligible to accept the same.

The Board's right to assign extracurricular responsibilities in accordance with Subsection 2 herein shall be limited to one such assignment per employee.

ARTICLE X

GROUP INSURANCE
[Pages A-16]

Section 2. Health and Hospitalization Insurance - Coverage: The Board agrees to pay health insurance premiums for certified personnel on the following basis:

$51.23 for family coverage per month
$43.16 for couples coverage per month
$20.92 for singles coverage per month

Any additional cost of premium shall be borne by the employee and paid by payroll deduction.

ARTICLE XI

LEAVES OF ABSENCE
[Pages A-18, A-18(a)]

Section 2. Emergency and Personal Leave:

Subd. 1: A full-time teacher may be granted an emergency or personal leave of no more than two (2) days per year, non-accumulative, the day(s) used to be deducted from sick leave, for emergency or personal situations that arise requiring the teacher's personal attention which cannot be attended to when school is not in session and which are not covered under other provisions of this Agreement.

Subd. 2: Requests for emergency leave must be made in writing to the Superintendent of Schools at least three (3) days in advance, whenever possible and, the request shall state the reason for the proposed leave. The District shall pay the substitute teacher's salary in the case of approved emergency leave.

ARTICLE XII

GRIEVANCE PROCEDURE
[Page A-24]

Section 4. Time Limitation and Waiver: Grievances shall not be valid for consideration unless the grievance is submitted in writing to the School District's designee, setting forth the facts and the specific provision of the Agreement allegedly violated and the particular relief sought within five (5) days after the date of the first event giving rise to the grievance becomes known to the

aggrieved party. Failure to appeal a grievance from one level to another within the time periods hereafter provided shall constitute a waiver of the grievance. An effort shall first be made to adjust an alleged grievance informally between the teacher and the School District's designee.

ARTICLE XIII

DURATION
[Pages A-28, A-29]

Section 1. Duration of Agreement: This Agreement shall be effective as of July 1, 1978, and shall continue in full force and effect until June 30, 1980, provided however, Article X, Group Insurance, Section 2., premium amounts; and Schedule "A" salaries, not steps nor educational columns therein, may be reopened annually. The Association must provide to the Board, not later than February 1st, all of their appropriate proposals. Said Agreement will automatically be renewed and will continue in full force and effect for additional periods of two years unless the Association or the Board gives notice to the other party not later than February 1st prior to the aforesaid expiration date or any anniversary thereof, of its or their desire to reopen certain provisions of this Agreement and/or additions to this Agreement, and to negotiate over the terms of those provisions; the notice to reopen shall name those provisions.

(BAEA Exhibit 3, Tr35)

19. Some time before July 24, 1978, Mr. Holzum, wrote to Mr. Pederson inquiring about provisions in the Second full and final offer that were not discussed at the bargaining table. (Tr78)

20. In Mr. Pederson's explanation of the second full and final offer, he testified that:

a. The Grievance Procedure (Article XII, Section 4) was not open or the subject of negotiations. The sentence of "Failure to file any grievance within such period shall be deemed a waiver thereof." was mistakenly left out and was a typographical error. (Tr165-167, also see Tr35, 89)

b. The sentence of "The School District shall pay the substitute teacher's salary in the case of approved emergency leave." was added to the second full and final offer, emergency and personal leave (Article XI, Section 2, Subsection 2.) because there was some confusion about what was presented at the bargaining table. (Tr166-168)

c. The agreement signed on March 21, 1978 for Article IX, Section 2 is almost identical to Article IX, Section 2 in the second full and final offer. (Tr163)

21. In a further explanation of the second full and final offer, Mr. York questioned Mr. Pederson as follows:

> Mr. York: On School Board's Exhibit B, we would like official notice to be taken of the document that starts at the top, 'Recommended Draft, Article XI, Section 2', moving down, then, to subdivision 2, that the Board conceded paying for the substitutes, which is a concession far and above what the teachers had requested and what the Board presented on June 28th; that BAEA Number 3, in fact, gives the teachers much more than what they had requested or what had been bargained for on June 28th.
>
> Mr. York: Is that a correct statement, Mr. Pederson?
>
> Mr. Pederson: Well, it is a clarification of what we presented on the 28th. We added that sentence there to -- in other words, there was confusion on subsection 2 when it was presented as to who was to pay the substitute on emergency leave. We had agreed that we were not changing that, but we were still going to pay the substitute in emergency leave so we incorporated that into our Full and Final offer, a sentence so that there was no misunderstanding that the School District would pay the substitute for emergency leave. (Tr167, 17-29- 168, 1-9)

Mr. York's statement above is not an admission of wrong doing (bypassing the exclusive bargaining agent) but a leading question. Therefore, I add validity to finding 20b because Mr. Pederson's first response was of his own free thought.

22. In Mr. Keedy's testimony about the second full and final offer, he stated that:

a. Mr. Pederson did make a proposal on June 28 which would have left the determination of the second year's wage schedule and other economic items up to mid contract negotiations. The teachers never accepted this change from the February agreement on a "closed" two year contract. (Tr 72-75, 77)

b. Article IX (Section 1, Extracurricular Compensation) of the second full and final is equal to the same Article in the first full and final offer. The objection is that no agreement had been reached and/or no discussion had taken place with respect to certain provisions of both the first and second full and final offer with the second full and final offer being mailed to all members. (Tr85, 86, 79, 80). More specific, our objection is the reference to "certified personnel" in section 1 of Article IX. (Tr79)

c. The second full and final offer clearly contains a dollar amount in the Extra Duty Schedule "B". (Tr82)

d. On June 28, 1978, the parties did discuss the principal subject of emergency and personal leaves but he could not recall the facts of the discussion. (Tr91)

e. The grievance procedure was not open for negotiations. (Tr35, 89)

23. On July 24, 1978, the School District prepared individual teaching contracts and mailed the contracts the next day or so:

TEACHER'S CONTRACT

SCHOOL DISTRICT NO. 38, BIGFORK, MONTANA

THIS AGREEMENT made and entered into this 24th day of July, 1978 by and between the Board of Trustees of School District No. 38, Flathead and Lake Counties, Bigfork, Montana, hereinafter designated as the School District, and ..... Lois Ann Pile ..... a legally certified teacher under the laws of Montana, hereinafter designated as the Teacher.

WITNESSETH:

1. That the School District hereby agrees to employ the said Teacher to teach ..... or to render related professional services, where assigned for the school year, which begins ..... September 5, 1978 .... and continues thereafter for a period of not less than 180, nor more than 187, teaching days (exclusive of legal holidays and vacations), as designated by the School District.

2. That the annual salary to teachers, principals, special teachers, or supervisors, shall be paid in twelve (12) equal installments, the first being due September 24, and the remaining on the same day of each succeeding month. Any balance accruing during the year shall be paid in the last installment. As amended page A-14 Sub-2, 1978-79 Master Contract.

The Teacher's salary shall be at the rate of Eleven Thousand Three Hundred Eighty-six and no/100---- DOLLARS ($11,386.00) per annum.

3. That said teacher represents himself, or herself, to be competent and legally qualified to teach in said District and that the information given in the application, upon which this contract is based, is true and correct. Said teacher shall be required to have affidavits of experience and transcripts of College and University training on file in the Superintendent's office.

4. That said Teacher shall conduct the school in accordance with provisions contained in The Teacher's Guide and Handbook of School District No. 38, Bigfork, and which provisions are incorporated herein by this reference, and it is further understood and agreed as one of the conditions of this contract, that should the Teacher be found inefficient in the discharge of his or her duty, disloyal to the interests of the school, or guilty of unprofessional conduct, the Board of Trustees reserves the right to dismiss said Teacher and cancel this contract; and in such case the part of the

annual salary still unpaid will be prorated for the actual time of service. As amended by 1978-79 Master Contract.

5. That under the provisions of the Teacher's Retirement Law, teachers who have elected to come under the terms thereof and, teachers who hereafter accept positions in the State of Montana, for the first time, are required to pay out of their salaries into the Teacher's Retirement Fund such sums as may be required by law, which shall be deducted accordingly by the District. The same shall be true for Social Security deductions.

6. That this instrument shall operate as the notice of election of the Teacher for the school year designated herein, and that, unless the Teacher shall accept, sign, and return said instrument to the office of the Superintendent of said District, by ..... August 1, 1978 ..... it shall be considered as nonacceptance and the Board of Trustees will proceed to fill the vacancy.

7. That said Teacher will be allowed 12 days sick leave during the term of his contract, said sick leave being cumulative to ..... days for the current school year and that the Board may require certification by a doctor if it desires all other absences shall be deducted from the salary of said Teacher on the basis of one one-hundred eightieth (1/180) of the annual salary. Board shall follow sick leave policy adopted in 1978-79 Master Contract.

8. That said teacher shall be at school by 8:15 a.m. and remain until 4:00 p.m. unless excused by the principal.

By Order of the Board of Trustees
ATTEST:

S/Marilyn P. Nylander
CLERK

Lois Ann Pile
TEACHER

S/Robert Hislop
CHAIRMAN

Salary Based On:
Training BA + 2
Experience 4 years
Extra Duties

TEACHER'S SIGNATURE

(The underlined portions indicate filled in Data and/or additions to the Teaching Contract) (BAEA Exhibit 4; Tr41, 43, 159)

The record is silent as to the reason for and/or the timing of the issuance of the teaching contract.

24. Mr. Keedy stated that:

a. The teachers had until August 1, 1978 to accept the teaching contract and failure to execute the teaching contract would mean nonacceptance by the teachers. The School District would then proceed to fill the vacant teaching position. (Tr 42, 43)

b. The teaching contracts are consistent with the School District's earlier proposals and the tentative agree-

ment reached on the morning of July 25, 1978 but the teaching contract did not address the salary schedule for the 1979-80 school year. (Tr 42)

c. Some teachers executed their teaching contracts while others held their teaching contracts. (Tr 44)

d. There were no mass firings or incidents because the teachers did not execute the teaching contracts. (Tr 45)

25. The eighth negotiation session took place on the evening of July 24 and early July 25, 1978 with Mediator Skaar. The negotiation session produced a tentative agreement on all outstanding issues including duty free lunch, elementary teacher planning time, health insurance premium cost, emergency leave, personal leave and the second year's wage salary. BAEA did make modifications to their positions in order to reach an agreement but not in the area of a "closed" two year agreement. Mr. York was to prepare the tentative agreement. (Tr 40, 58, 59, 63, 64, 93, 110, 113)

On July 24, a substantial number of other teachers joined the four teachers on the BAEA negotiation team. As the meeting progressed, the number of additional teachers decreased to about 7 or 8. (Tr 61, 62)

26. On July 26, 1978, Mr. York produced and mailed to Mr. Keedy the tentative agreement reached on July 25. The tentative agreement consisted of the second full and final offer plus certain additions but did not include a new salary schedule for the first year of the contract. The additions contained the following significant sections:

Article VII
Duty Day

Add the following language to [page A-11] of the Board's Full and Final offer, dated: July 10, 1978, as follows:

Section 4, Duty Free Lunch: Each certified teacher grades K-6 shall have a free period during the noon lunch and recess period of not less than 20 minutes. Playground and lunch duty will be on a rotating basis and, such assigned teacher will be provided with a hot lunch, provided however, in the event the hot lunch program is discontinued the parties hereby agree to immediately negotiate a benefit of comparable value. During this free time, no teacher

shall be required to supervise students in the lunch room or on the playground. Teachers shall be allowed to leave the school grounds, provided they have notified the office, during this duty free lunch period.

Section 5. Elementary Teacher Planning Time: Each full time teacher in K-6 grade shall have one (1) hour of planning time per week between hours of 8:45 and 3:30. Planning time may be in half hour increments. During this planning time, such teacher shall not be required to have pupil contact.

(BAEA Exhibit 8)

27. The BAEA voted to reject the tentative agreement on July 31, 1978. (Tr 44). Mr. Keedy stated ratification was virtually impossible because he guessed the teachers received the teaching contracts on or about July 25 or 26 with directions to execute them by August 1. Mr. Keedy continued to explain by stating that he had not received Mr. York's tentative agreement draft at the time the teachers received their teaching contracts. (Tr 43, 41)

Mr. Keedy wrote to Mr. York on August the 1, 1978:

At least in part, this vote was a result of the Board's issuance of individual contracts to the teaching staff prior to my receiving the Board's draft language (and thus prior to the local's being able to vote on the tentative agreement). Those contracts are dated July 24, and the teachers were given until today to sign and return them.

The contracts indicate that unless teachers did so the positions would be considered vacant, and filled by the Board. However, as you know, the teachers in the spring signed so-called "letters of intent" to return to the district in the fall, and consider themselves already re-hired by the Board, to teach in 1978-79 under terms and conditions of employment to be determined through the negotiations process.

(BAEA Exhibit 6)

28. On August 16, 1978, Mr. York replied to Mr. Keedy:

First, we acknowledge that the teachers' association rejected the tentatively agreed upon modified full and final offer;

Second, we acknowledge that the teachers' signed letters of intent to return to the district in the fall and, we too, consider them re-hired by the Board and, encourage them to report for work at the designated date and time as instructed. However, all teachers' returning to work on the designated date and time will be paid and their conditions of employment shall be governed by the Board's modified full and final offer which, is that modified full and final offer tentatively agreed upon July 25;

Third, we acknowledge your request for further bargaining. In view of the impasse, further bargaining would not be fruitful, therefore, we must respectfully decline...

Further, as we have been unable to reach you by telephone, we hereby, invite and encourage you to attend the public meeting on the evening of August 21, 1978. Please be advised that this meeting is informational only and, not for the purposes of either, separate or collective bargaining.

(BAEA Exhibit 7)

29. A public information meeting arranged by the School District took place on August 21, 1978. The School Board, Mediator Skaar, numerous teachers and interested citizens were present. The parties explained their positions and answered questions. (Tr 45, 118)

At the conclusion of the public meeting, a conversation took place between Mediator Skaar, Mr. Pederson and Mr. Keedy. During the conversation, Mediator Skaar offered her services and Mr. Keedy requested they resume negotiations the following evening or as soon as possible. Mr. Pederson replied the School District would not meet again with the BAEA until the School District received in writing a proposal which they considered sincere. Mr. Keedy protested and stated he would not allow the bargaining unit to couch their position in a context which would meet the general approval of the School District first before the District would agree to sit down and negotiate again.

After a short conference with the other School Board members, Mr. Pederson returned and agreed to meet the next night. (Tr 46, 47)

30. The ninth and last negotiation session between the parties took place on August 22, 1978 with Mediator Skaar present. For the most part of the session, Mediator Skaar kept the parties apart and acted as a go-between. (Tr48). The notes of the School District state the following, in part:

Terry Gross presented package offer to the Board from BAEA:

1) Willing to lower base salary to $9,000 (from Bd. offer of $9,056) (Mr. Keedy felt would give extra $58

to $75 per teacher for Board to finance rest of package) -- then 79-80 base $9,800.

2) Teachers would pick up entire increase (45%) on their Blue Shield policy this year, Board pick up entire cost on health insurance 79-80.

3) Duty Free Lunch, Section 4 remain intact except delete last sentence "Duty free recess shall be contingent upon staff providing at least 1 teacher for playground supervision for grades 4 - 8."

4) Preparation Time - amend proposal to read: "All teachers K-6 shall have 1/2 hour per day preparation time between 9:00 a.m. and 3:30 p.m. of non-pupil contact time exclusive of before or after school, and lunch time.

5) Personal Leave -- 2 days, pay substitutes, not deduct from sick leave.

6) 2 year closed contract.

Teachers feel that since they have gone backward and are also willing to pay the substitutes on their personal leave, it is really a non-money package.

8:00 [p.m.] Bill Pederson asked for a caucus.

8:30 Bill discussed BAEA proposal:

At first the offer looks attractive, but savings in the High School would not help in the Grade School and it seems to discriminate against the High School faculty.

Personal Leave-the Board wants to maintain their July 24th offer.

Duty Free Lunch-Board wants to maintain management flexibility to provide supervision that may be needed, so offer of July 24th remains as is.

Bill Don Tigny asked for some guarantee of free time, said they didn't care how long but would like some idea of a schedule.

Bill Pederson responded that if it was dropped from the contract the administration and teachers could work out some schedule.

Prep Time--The Board re-submits their offer of July 24th. Health Insurance - Same as July 24th. Closed Contract - Will agree to a 2-year closed contract.

This is basically the same offer Board made on July 24th.

8:35 BAEA requested a caucus.

Ms. Skaar asked to talk with the Board members. Took an offer to the BFEA to lengthen duty-free lunch time to 30 minutes (wording remain the same, just change amount from 20 minutes to 30 minutes)

10:05 BAEA presented another proposal:

1) Lower rates on Schedule B to standard 7% raise (Would result in budgetary savings)
2) Base salary of $9,000 for 1978-79 and $9,800 for 1979-80
3) Health Insurance for 78-79: Board pay full coverage which would be $65 for families, $55 for couples, and $30 for singles.
4) Duty Free Lunch: 30 minutes while students are on the playground, but would supervise their own classes in the lunchroom.
5) Personal Leave: 2 days, teacher pay substitute, and not have it deducted from emergency leave.
6) Preparation Time: 1/2 hour per day.

10:48 Board responded to Ms. Skaar:

1) Reject the change on Schedule B. We already have personnel working and that change would be inconsistent with our Full and Final offer.
2) $9,000 base is deceptive because of the request for $9,800 second year plus insurance.
3) Too much for us to be willing to accept the second year; we would not be able to determine the cost at this time.

Health and Salary proposals remain as of July 24th.

4) K-6 previously offered 30 minutes, but cannot accept stipulation of no playground duty. We can't become obligated to hiring someone extra if we can't afford it.
5) Personal Leave: 1 day, teacher pay the substitute, not deduct it from emergency or sick leave.
(In effect offering 2 days emergency and 1 day personal).
6) Preparation Time: Stay with July 24th offer--no change.

10:55 Ms. Skaar took offer to BAEA.

11:20 BAEA proposal to Board.

1) 1978-79 Base Salary of $9,058
1979-80 Base Salary of $9,800
2) Health Insurance: Increase in premiums paid by teachers in 78-79, Board pick up total package cost in 1979-80.
3) Duty Free Lunch: 30 minutes duty free lunch and free of playground duty--but would take if base was raised to $9,227.
4) Personal Leave: Will take 1 day as offered.
5) Preparation Time: K-6 teachers have 2 hours exclusive of pupil contact per week--if want to, can lump--not before or after school.
6) Pe [sic]

11:50 Board to BAEA:
Will stay with the 30 minute duty-free lunch time and personal leave of 1 day as offered. We feel

we are not getting anywhere, so will stay with offer of July 24th and propose we break off for tonight.

12:00 BAEA would like to open again tomorrow at 7:30. Promise to have proposal for consideration.

Bill Pederson told mediator that board felt they were not getting anywhere. She proposed we meet again on August 23 at 7:30. Board told her if the BPEA have any proposals they (the Board) would wait until 1:00 a.m. to consider any such proposals.

12:38 BAEA to Board:

1) Duty Free Lunch--30 minutes with a maximum of 2 teachers on playground duty per day. 1 intermediate and 1 primary teacher, on rotating basis.
2) Insurance--Teachers this year, Board total package next year.
3) Salary--as proposed on July 24th O.K.
4) Personal Leave--1 day O.K.
5) Preparation Time--2 hours per week as proposed (K-6)

12:57 Board asked BAEA to clarify on how plan to handle the lunchroom duty.

1:18 Linda Skaar: Well, if rest of the package is acceptable both sides could get together and work out the wording.

Bill Pederson: Rest of the package is not acceptable. We cannot possible go with the insurance and prep time as they propose.

Linda: Well, tomorrow--7:30!

Bill: No. If they want to submit, in writing, a different proposal we will consider it and then meet if we feel it would be profitable. We will stay with the proposed change on personal leave of 1 day, not deducting it from sick or emergency leave; and the 30 minutes duty free lunch time as we proposed.

1:30 Meeting adjourned.

(School District 38 Exhibit C)

31. In addition to the notes above, Mr. Pederson explained the School District requested through the mediator during the session that the BAEA put their counter proposals in written form because the proposals were hard to follow and evaluate. The BAEA did not reduce their counter proposals to writing. (Tr 181-183)

Mr. Pederson agreed the "profitable" statement (see above) means that if a proposal is submitted in writing and the proposal

is acceptable to the School District, they will then decide whether or not to return to the bargaining table. (Tr188, 189)

Mr. Pederson also stated that at this session both parties made proposals different from previous proposals. (Tr189)

32. In explanation of the last negotiation session, Mr. Keedy stated that:

a. No tenative agreement was reached at the August 22, 1978 meeting.

b. Both the School District and the BAEA made proposals, counter proposals and concessions. (Tr64, 48)

c. The BAEA made several different proposals, increasing some benefits and decreasing other benefits, in an effort to arrive at a labor contract. (Tr48, 65, 66, 207, 210)

d. During the mediation session the issues of the negotiation were clear to the BAEA. The parties mutually understood the outstanding issues. He does not know what he could have done differently in a written proposal. (Tr209-211)

e. The School rejected the BAEA's later proposals stating the proposals were not sincere, and declared an impass. (Tr48)

f. He did consider the BAEA's proposals intelligent. (Tr68)

g. The School District would only meet if the BAEA first submitted a written proposal to the School Board and if the proposal appeared sincere. (Tr49)

h. Early on August 23, 1978, the mediator was attempting to arrange another negotiating session for that evening. (Tr202, 209)

i. The parties have not met in negotiations again. (Tr48, 50)

j. Playground duty or not, during duty free lunch, effects about 12 out of 44 or 45 teachers. (Tr68).

33. At the conclusion of the August 22, 1978 negotiation session, Mr. York advised the School District to implement the third full and final offer which contained the latest School District concessions. (BAEA Exhibit 9, Tr135, 136)

34. The News Release issued by the School District on August 24, 1978, stated:

> In regards to the negotiations session with the Bigfork Area Education Association affiliated with the Montana Education Association on August 22, I would like to make the following statement on behalf of the Board of Trustees.

First, it was not hard to recognize that the Education Association was more interested in setting the Board up for a press release than they were in negotiating. Their offer to reduce the base salary to $9,000 and reduce the extracurricular pay for coaches in order to provide duty free lunch and preparation time for the Kindergarten thru 6th grade teachers appears very generous at first observation. However, they did not go on to say that it was a package offer with provision for a base salary of $9,800 and the Board picking up the entire health insurance premium for the 79-80 school year, which would amount to an estimated 15 to 20% budgetary increase next year. Also we can not transfer money from the high school budget to the grade school budget, therefore, the Board felt it was discriminatory to ask the high school teachers to take a reduction in pay and in extra-duty salary to provide the K thru 6 teachers additional benefits in the Master Contract.

At the public meeting the teachers indicated that salary was not the issue but Personal leave and Duty Free lunch were. In regards to Personal Leave the Board did modify their offer to provide for one day Personal Leave, non-deductible from sick or emergency leave. .....

In regard to Preparatory time and Duty Free Lunch, These items involve only the K thru 6th grade teachers. The Board did modify their offer to provide for a minimum of 1/2 hour of Duty Free lunch but did not change their offer of 1 hour preparatory time.

The Education Association's last proposal of a minimum of 1/2 hour Duty Free lunch with a maximum of 2 teachers per day assigned noon playground duty and 2 hours of preparation time exclusive of pupil contact per week between the hours of 9 a.m. and 3:30 p.m. does not appear like much on the surface. What it means is that based on 12 teachers in the 1st thru 6th grade, they could be assigned 1/2 hour of noon duty every 6th day. The other 5 days they would have 1 hour Duty Free lunch. Considering the school day for the students is 9 a.m. to 3:30 p.m. or 32 1/2 hours per week, the K thru 6th grade teachers, in effect, propose that the administration can only assign them pupil contact of 26 hours per week, while state standards provide up to 28 hours per week.

The Board's position is that an impasse has been reached with the Bigfork Area Education Association and that if they have any further proposals they should submit them in writing to the Board and if it appears that the Association is sincere in their proposal the board will meet with them.

(BAEA Exhibit 14; Tr171, 172)

35. Mr. Pederson states that BAEA never proposed any transfer of monies from the high school budget to the elementary school budget or vice-versa. Mr. Pederson further states that BAEA never proposed to the school district the addition or the elimination of teaching positions in the school system. (Tr 198, 199)

36. On the witness stand Mr. Pederson explained impasse as follows:

a. Mr. York, direct examination:

Mr. York: They are alleging in the Complaint that you called an impasse to bargaining; can you state narrative-wise why you felt the need to call an impasse?

Mr. Pederson: Well, first of all, I didn't feel that what they were asking for was to reduce the salaries of all the teachers in order to provide the duty free lunch and preparatory time for the K through 6, and then were also asking us to pick up, I believe it was in the neighborhood of around 20 percent commitment for the following year -- 18 to 20 percent. Anyway, all the proposals were proposals that I did not feel were really sincere that we could accept, and you might review in the notes here that we expressed that the mediator -- I believe it was around midnight -- and then we did agree to stay on after that to see if the BAEA would present something that appeared sincere, and we didn't feel that their last offer was sincere, and we were just as far off as we ever were as far as reaching an agreement. (Tr172, 6-24).

Mr. York: Again, I would ask you, do you consider this 11:20 proposal made to you as a sincere effort by a party to reach an agreement?

Mr. Pederson: No.

Mr. York: Why?

Mr. Pederson: Because asking $9227 in which to accept the duty free lunch; in other words, to take the duty free lunch. In other words, I think we narrowed down in negotiations that duty free lunch and preparation time are a couple of the items that we had held out to for quite some time; that we wanted deleted from the contract. And if you go back to our meeting where we reached tentative agreement, Mr. Keedy said that there was no way that he could reach agreement if we left those out of the contract so we did concede to put those back in the contract with some modifications at that meeting and then to reach tentative agreement that night. Then we go into this meeting, and we just start in manipulating around, it appeared to me. (Tr 174, 24-28 - 175 1-14)

b. Mr. Hilley, cross examination:

Mr. Hilley: July. After July, what was the big hang-up between the parties, and the reason I am asking you this is yesterday, we were characterizing quite a bit about negotiations and what the real hang-up was. What was the real core difficulty or difficulties between the parties in August primarily? I think we have to put August.

Mr. Pederson: I really don't know. We reached tentative agreement, and it seemed like everything still came back around to Sections 4 and 5 [Article VII; Duty Free

Lunch, Elementary Teacher Planning Time] in the contract. (Tr 194, 8-16)

c. Examination by Hearing Examiner:

Hearing Examiner: But the hard core seemed to be those groups; in other words, 4 and 5 on one side; wages on the other?

Mr. Pederson: Well, wages had been pretty well settled at one time. In other words, everything -- we reached a tentative agreement on the 24th. When we went back in on August 22nd, it was hard to tell just what was the issue. In other words, 4 and 5 seemed to get back into it. In other words, there was manipulations with the wages that I thought were pretty well settled; our schedules and so forth in order to get at items 4 and 5.

Hearing Examiner: Basically, what my big question is is this; I would like to know the subjects that were outstanding or so-called impasse or that you guys couldn't agree upon at -- if you want to use 7/24 negotiation meeting and 8/22 negotiation meeting; in other words, what were the subjects that were outstanding? That is my question.

Mr. Pederson: I believe it was health insurance, personal leave and preparation time. Basically, the salary was fluctuating back and forth. It was the moving of the salary back and forth as to providing money for those other items. (Tr203, 10-27, also see Tr191)

I believe the outstanding issues in negotiations are duty free lunch, health insurance and preparation time as stated in finding 30, 12:38 p.m. and 1:18 a.m. I reject Mr. Keedy's expanded list of outstanding issues in findings 38c. In finding 30, 12:38 p.m., the BAEA proposed duty free lunch, health insurance and preparation time and approved salary's and personal leave.

37. Mr. Pederson further answered that preparation time and duty free lunch, Section 4 and 5, are policy decisions of the School Board. (Tr178, 179)

38. Mr. Keedy explained impasse as follows:

a. Mr. York, re-cross:

Mr. York: So both parties were giving and taking and moving along in what they felt was good faith bargaining on certain subjects, and parties were retaining a fixed position on certain other subjects; isn't that a fair evaluation?

Mr. Keedy: I think it is. (Tr103, 15-19)

b. Mr. Hilley, re-redirect:

Mr. Hilley: After August 22nd, was the Board's position very fixed?

Mr. Keedy: I am sure it was because the Board said at the conclusion of the August 22nd meeting that we had reached an impasse and that they wouldn't meet with us again to resume negotiations unless we met certain conditions. (Tr 183, 25-28 - 184, 1).

c. Mr. Hilley, rebuttal:

Mr. Hilley: All right. Now, I think I do have one other question which was asked by Mr. D'Hooge to Mr. Pederson, and that was at the end, and let's say August 22nd, what were the gut core issues, so to speak, of collective bargaining, and why didn't the parties reach an agreement?

Mr. Keedy: Well, on the 22nd of August, there was movement on both sides, and we were, in our judgment, moving closer and closer with every passing hour to an agreement. I guess in answer to the second part of your question, the meeting did not result in a settlement because it was adjourned by the School District at 1 A.M. or some similar hour with the announcement to us that they wouldn't return to the bargaining table until we submitted a written proposal which they considered serious or sincere. The gut or core issues that you referred to, I guess were those that were still outstanding on the table, including salaries, health insurance benefits, the length of the duty day, the question of personal leave, its availability to the teachers, a preparation period in the elementary system; in order to forge an agreement, we tried everything we could as a bargaining team to offer a series of proposals to the School District's team in package form, reworking the package from time to time in an attempt to find something in that mix of issues which would appeal to the School District enough for them to either make a productive counterproposal to us or actually reach agreement.
(Tr 207, 7-28 - 209, 1-5)

39. On August 29, 1978, Mr. Keedy wrote to Mr. York as follows, in part:

> This is simply our request, on behalf of the Bigfork Area Education Association (BAEA), that you and/or the trustees' negotiating team meet with us at the earliest possible opportunity to resume negotiations on the 1978-80 contract.
>
> We're prepared to meet any time, but for your consideration propose the following, alternative dates: September 5, 6, 7 or 8; September 11, 12, 13, 14 or 15, 1978. Would you please advise.

(BAEA Exhibit 5)

40. Neither Mr. Keedy nor the BAEA received a reply to Mr. Keedy's August 29 letter. (Tr 50, 194). Mr. Pederson explained

that he was aware of the letter, but at about the same time the School District became aware of some of the teachers forming the Bigfork Teachers Association (BTA) and the School District was not sure which group they should bargain with. (Tr 134, 144)

41. At a special School Board meeting on August 30, 1978, the School Board ordered the implementation of the wages, hours and working conditions contained in the third full and final offer. (BAEA Exhibit 9; Tr 148, 156). The implemented wages, hours and working conditions included, insurance premium cost, extra duty pay, personal leave, basic work day, plus the August 22 School District consessions. (Tr 156). Some of the items implemented in the third full and final offer were unsettled points of negotiation. (Tr 120, 121)

Mr. Pederson explained the reason for implementing the third full and final offers as:

a. Both the teachers and the administration had to be aware of the conditions they were working under. (Tr 136)

b. School was starting and the School District unilaterally implemented the third full and final offer and imposed the offer upon the teachers. (Tr 137)

42. On August 31, 1978, the School District called all teachers to a system wide orientation meeting. At the meeting, the School District passed out the third full and final offer and Joe Eslick (superintendant of Bigfork schools) stated that he was instructed to inform the teachers they would be working under the conditions set forth under the third full and final offer. Tr 119, 120.

43. In early September 1978, the BTA circulated the following petition:

> A majority of the employees of Bigfork School District #38 have elected to disclaim any interest in the Montana Education Association and/or Bigfork Area Education Association of representation for the purposes of wages, hours, and any other conditions of employment.
>
> We have formed our own alternate group hereafter to be called the Bigfork Teacher's Association.

Therefore, in view of our decision we respectively [sic] request that your office provide us with the necessary forms and instructions in order to accomplish such a disaffiliation.

Sincerely,

S/_____
Richard O. Baird, Jr.
Acting President

Dated this 5th day of September, 1978.

S/ Teachers Signatures

(School District 38 Exhibit D)

The above decertification petition was executed by 23 teachers of the Bigfork School System. The petition was hand delivered to Mr. Eslick on September 6, 1978. (Tr 150). The petition was received by the Board of Personnel Appeals on September 11, 1978. (DC #5-78, Tr 122)

44. A letter from the BTA to the School District dated September 7, 1978 states:

Enclosed is a copy of a certified letter that was sent to Mr. Robert R. Jensen, Administrator, State Board of Personnel Appeals, Helena, MT.

Pursuant to Section 59-1606 (1) (ii) of the Montana Revised Codes [39-31-207(a)(ii), MAC] we (the majority of certified teachers of School District #38) do hereby petition to decertify the Bigfork Education Association. We also request that the school board immediately recognizes the Bigfork Teachers Association as the exclusive representative of the certified teachers of School District #38.

We wish to reopen negotiations as soon as possible.

(School District 38 Exhibit E, Tr123)

45. A meeting between Mr. York, Mr. Eslick, and Mr. Pederson took place on September 12, 1978. In explanation of the meeting, Mr. Eslick stated that:

a. The meeting was to determine if the BTA was real. (Tr155)

b. In the comparison of the signatures on the decertification petition to signed contracts and to dues check-off cards, the decertification petition represents the majority of teachers. (Tr151)

c. We decided to meet with the BTA. (Tr155)

AMENDMENTS TO THE JULY 1, 1978 MASTER CONTRACT AS AGREED UPON BY THE SCHOOL BOARD AND THE BIGFORK TEACHERS' ASSOCIATION SUBJECT TO THE RATIFICATION VOTE.

Agreement page: Bigfork Area Education Association affiliated with MEA
To--Bigfork Teachers' Association
Article I: Bigfork Area Education Association
To--Bigfork Teachers' Association
Article II, Section 1: Bigfork Area Education Association (BAEA)
To--Bigfork Teachers' Association (BTA)
Article V, Section 5: Addition - In such case that the teacher involved in such a matter feels that an extended period of time is necessary to seek professional advice, he shall be granted a maximum of 15 days to obtain this advice; provided he notifies the superintendent of his intentions within the original 48 hour time span.
Article VIII, Section 1, Subd. 2: Change entire Subd. to actual salary schedule "C".
Article VIII, Section 2, Subd. 7: Addition-"..., one principal, and one teacher from the high school and one teacher from the elementary school, each teacher being elected by the BTA. ....
Article X, Section 2, Paragraph 3: delete to read: Health and Hospitalization Insurance will be open to negotiations for the reconsideration of both the basic plan and the amount of the district contribution for the second year of this agreement.

(BAEA Exhibit 11, Tr128, 129)

This tentative agreement was put into each teacher's mail box. (Tr124)

50. On September 19, 1978, the Board of Personnel Appeals wrote to the BTA as follows:

> In response to your petition of September 5, Section 59-1603(4) [39-31-206, MAC] provides:
>
> "Certification as an exclusive representative shall be extended or continued, as the case may be, only to a labor or employee organization the written bylaws of which provide for and guarantee the following rights and safeguards and whose practices conform to such rights and safeguards as: Provisions are made for democratic organization and procedures; elections are conducted pursuant to adequate standards and safeguards; controls are provided for the regulation of officers and agents having fiduciary responsibility to the organization; and requirements exist for maintenance of sound accounting and fiscal controls including annual audits."
>
> As soon as your local group, the Bigfork Teachers Association, provides this office with a constitution and bylaws as required in the above section of Montana collective bargaining statute, we will immediaely serve the peti-

d. We directed Mr. York to file an employer's petition with the Board of Personnel Appeals. (Tr155)

46. On September 12, 1978, Mr. York wrote to the Board of Personnel appeals as follows, in part:

> Please consider this letter as a valid petition pursuant to Section 59-1606 (1) (b) [39-31-207(b), MAC] of the Montana Public Employees Collective Bargaining Act. If a particular form is required, please supply my office (C.O.D.) with such.
>
> This petition is filed in view of conflicting representation claims, i.e., between the Bigfork Area Education association, affiliated with Montana Education Association (BAEA); and, the Bigfork Teachers' Association (BTA).

47. Mr. York advised the School District to withhold negotiation with the BAEA and stated they would need an election to determine the majority status. (Tr135)

48. At a special meeting of the School Board on September 15, 1978, the School Board and representatives of the BTA met. The School Board voted to recognize the BTA. (Tr155). The Board's minutes reflect the following:

> "..... these minutes are under date of September 15, 1978. The next to last paragraph, "Gordon Guenzler moved to recognize Bigfork Teachers Association and authorize negotiations committee to enter into negotiations with them. Motion was seconded by Ronald Pierce and carried unanimously." The last paragraph is "Motion carried to adjourn." These minutes were approved on October 9, 1978." (Tr127, 8-14).

In explanation of the School District actions, Mr. Pederson stated that they had received a copy of the decertification petition from the BTA which contained signatures of the majority of the teachers and the School District felt that since it was the majority of the teachers, they should deal with the BTA. The above School Board minutes do not state a withdrawal of recognition from the BAEA, but the School Board's intent was to withdraw recognition from the BAEA. The School District recognized the BTA without an election. (Tr127, 185, 186)

49. The School District and the BTA met once on September 18, 1978 and reached a tentative agreement. The following changes to the third full and final offer were agreed to:

tion on the employer and begin the election proceedings. (DC #5-78)

51. During the week of September 18, 1978, the following notices appeared in the teachers room, elementary school:

> Attention All Teachers!
>
> There will be a general vote among all teaches in the Bigfork Schools for the purpose of determining ratification or non-ratification of the negotiations agreement reached by the B.T.A. and the School Board last week. The voting will take place in the GUIDANCE OFFICE, ROOM 106 of the HIGH SCHOOL on TUESDAY, SEPTEMBER 26, 1978 between the hours of 8:00 A.M. and 5:00 P.M. Full details of the voting procedure can be determined by consulting the appropriate section of the By-Laws of the Bigfork Teacher's Association.

(BAEA Exhibit 10, Tr122)

52. On September 29, 1978, the BTA filed the necessary by-laws with the Board of Personnel Appeals. (DC #5-78)

53. The board of Personnel Appeals served the decertification petition on the employer on October 2, 1978. (DC #5-78)

54. The Board of Personnel Appeals entered the following order, in part, on October 12, 1978:

> The validity of this Employer Petition, First Amendment, is recognized insofar as the above-cited information indicates that there has been a sufficient demand for recognition made of the employer by the BTA and there is a question as to the recognized bargaining representative's majority status.
>
> However, the Employer Petition, First Amendment, is based on and seeks the same remedy as the BTA's Decertification Petition (i.e., an election to determine the exclusive representative of the bargaining unit in this matter). Because the BTA's Decertification Petition is now being processed, it is deemed unnecessary to repeat the process of determining who in fact represents the majority of those employees in the bargaining unit by serving the Employer Petition, First Amendment, at this time. Therefore, the Employer Petition, First Amendment, will not be served pending resolution of the BTA's Decertification Petition in this matter.

(Employer's Petition, Bigfork)

55. At the time of the hearing in this matter, the School District had not voted to accept the tentative agreement with the BTA but will vote on the tentative agreement. (Tr128)

56. On October 31, 1978, the Board of Personnel Appeals entered the following order:

Having considered the incumbent labor organization's Motion to Dismiss or to Postpone Indefinitely and the employer's Brief in Opposition, the Board of Personnel Appeals orders as follows:

1. That the Motion to Dismiss or to Postpone Indefinitely be denied.

2. That, in view of this Board's investigation and the unfair labor practice charges filed prior to the filing of this decertification petition, an election will not be scheduled until this Board is assured that the necessary laboratory conditions are present.

(DC #5-78)

IV CHARGES, DISCUSSION, AND CONCLUSION OF LAW

A. ULP #20-78, Count 1.

Issuing Individual Teaching Contracts

1. THE CHARGE (in part):

On or about July 24, 1978 during the bargaining process, the Defendant issued individual contracts to the teachers with a demand to return them within ten (10) days. This was individual bargaining, coercive in nature, and an attempt to deny teachers their rights as protected by Section 59-1603(1), R.C.M. 1947. It constitutes a failure to bargain in good faith under the rationale of ULP 17-1975, Billings Education Association v. School District #2, Billings High School District. Notice of re-employment letters had been issued to the teachers on or about March 23, 1978 which were to have been returned no later than April 20, 1978. The Defendant School District had all information necessary relating to which teachers would be returning for the 1978-79 academic year and where there were vacancies which would have to be filled during the summer. Issuance of individual contracts in July, with a ten day period for acceptance, served no purpose except harrassment of the teachers and interference with bargaining.

2. DISCUSSION.

The school district issued individual teaching contracts. (FF 23). The question here is the School District's intentions, timing and the effect of issuing the individual teaching contracts. The School District argued that the individual teaching contracts were needed to employ teachers under section 20-4-201 MCA, which states in part:

Each teacher shall be employed under written contract, and each contract of employment shall be authorized by a proper resolution of the trustees and shall be executed in duplicate by the chairman of the trustees and the clerk of the district in the name of the district and by the teacher.

The Montana Statute does not outline the contents needed for

the individual teaching contract or state when the individual teaching contracts are to be issued.

Because the teachers in the spring of 1978 signed letters of intent to return, the parties considered the teachers employed. (FF 27,28). Therefore, I do not believe the school district's immediate intentions were to employ teachers by issuing the individual teaching contracts.

The School District must issue individual teaching contracts as required by section 20-4-201 MCA. In complying with the above section, the School District must issue individual teaching contracts in such a way that the teaching contracts are contracts of employment and not an erosion of the public employee's collective bargaining rights. The public employees rights are set forth in section 39-31-201 MCA as follows:

> Public employees shall have and shall be protected in the exercise of the right of self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours, fringe benefits, and other conditions of employment, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection free from interference, restraint, or coercion.

For the NLRB, this balance between the individual contracts and a master labor agreement was first addressed by the U.S. Supreme Court in J.I. Case 321 U.S. 332, 14 LRRM 501, (1944) which states:

> Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than a contract of employment.....
>
> After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings. The employer, except as restricted by the collective agreement itself and except that he must engage in no unfair labor practice or discrimination, is free to select those he will employ or discharge. But the terms of the employment already have been traded out. There is little left to individual agreement except the act of hiring. [Emphasis added]. This hiring may be by writing or by word

of mouth or may be implied from conduct. In the sense of contracts of hiring, individual contracts between the employer and employee are not forbidden, but indeed are necessitated by the collective bargaining procedure.

But, however engaged, an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement, even if on his own he would yield to less favorable terms. The individual hiring contract is subsidiary to the terms of the trade agreement and may not waive .....[Emphasis added]

Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement....

It is equally clear since the collective trade agreement is to serve the purpose contempleted by the Act, the individual contract cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the trade agreement. The very purpose of providing by statute for the collective agreement is to supersede the terms of seperate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group....

The above balance and case is in compliance with Section 1-4-101 MCA which states in part "...Where there are several provisions or particulars, such a construction is, if possible to be adopted as will give effect to all." By allowing Section 20-4-201 MCA to be used as an employment contract and a section 39-31-201 MCA to be used as a contract for wages, hours and fringe benefits, the two contracts meet the requirements of section 1-4-101 MCA.

This same principle was reviewed by the thirteenth Judicial District in Board of Trustees of Billings School District No. 2, v. State of Montana ex rel Board of Personnel Appeals, Cause No. 70652. The District Court stated in part:

.....[The] third basis for requesting review is its claim that the BPA's final order effectively repealed a statute of the state of Montana (Section 75-6102, R.C.M. 1947 [20-4-201 MCA]) which action is in excess of the agency's statutory authority. We find no such administrative repeal of a Montana statute. The final order of the Board of Personnel Appeals clearly recognizes the validity of Section 75-6102 [20-4-201 MCA].

It is (a) fundamental principle of statutory interpretation that when interpretating statutes they

> must be interpreted, if possible, so that they are not conflicting. Therefore, in interpreting the action of the Legislature of placing the teachers under the Public Employees Collective Bargaining Act which gives public employees the right to bargain collectively and to engage in other concerted activities, along with 75-6102 [20-4-201 MCA] requiring the issuance of individual contracts. It becomes obvious that the intention of the Legislature was not to allow the substitution of individual contracts for that of the Master Agreement. Final Order, ULP #17-1975, page 5, lines 3-11.
>
> The order of the administrative agency merely requires the School Board to "cease and desist from including in individual contracts issued to teachers any matters concerning wages, hours, fringe benefits and other conditions of employment which have not been agreed to in a Master Agreement". Also, the School District is forbidden to use individual contracts to interfere with teachers' rights guaranteed in Section 59-1603 R.C.M. 1947 [39-31-201 MCA]. Individual contracts as required by Section 75-6102 R.C.M. 1947 [20-4-201 MCA] may certainly still be issued to Billings teachers by the Billings School Board. The statute has not been repealed.
>
> Note: This cause is under appeal to the Montana Supreme Court.

Parts of the individual teaching contract contain statements making the contract subject to the 1978-79 master contract as amended. Other statements added to the teaching contract are not a clear statement of subservience. The wages in the individual teaching contract contain no statement making the wages subject to the wages in the master agreement. (FF23). Because item 6 of the individual teaching contract requires the teachers to execute the teaching contract by August 1, I believe the intent of the School District was to force a wage offer and other possible provisions onto the teachers or have their jobs vacated. On June 28, 1978, the School District questioned the BAEA's attitude concerning Individual Teaching contracts. The question was if the School District should draft its second full and final offer and issue individual teaching contracts to reflect the full and final offer, would the BAEA advise the individual teachers to sign the contracts? The BAEA protested and stated "no". (FF16, 17g). In order to start the implementation of the School District's second full and final offer, the School District issued its second full and final offer on July 10, 1978 to each

teacher. (FF 18). In an attached letter to Mr. Keedy, the School District requested the BAEA to vote on the second full and final offer no later than July 23. The letter also stated that if the BAEA rejected the second full and final offer, the offer would be put into effect on July 24. (FF18). On July 24, the School District prepared individual teaching contracts. (FF23). Also on July 24 and early July 25, the parties reached a tentative agreement. (FF25). The teachers received the individual teaching contracts on July 25 or 26. (FF27). The individual teaching contracts were consistent with the tentative agreement and earlier School District proposals because the teaching contracts addressed only one year of a two year agreement and the first year's wage offer did not change from June 20. (FF16, 18, 23, 24b, 25, 26). On July 31, the BAEA rejected the tentative agreement, (FF27). The teachers had until August 1, to execute and return the individual teaching contract or their teaching positions would be assumed vacant. (FF23, 24a).

Montana's statute is silent as to when the School District must issue individual teaching contracts. Why did the School District issue the individual teaching contracts before the negotiation session or during the negotiation sessions on July 24 and 25? Why did the School District issue the individual teaching contracts before the teachers had a chance to vote on the tentative agreement? Why did not the School District issue the individual teaching contracts in May or at the system-wide meeting on August 31 or after an approval of a tentative agreement? I can only conclude that the School District timed the issuance of the individual teaching contracts with the collective bargaining process. The School District issued the individual teaching contracts before or during a mediation-negotiation session that produced a tentative agreement. A mediation-negotiation session is a delicate time. I can only conclude that the timing of the

teaching contracts interferred with the collective bargaining process. The School District argues the affect of issuing the individual teachers contracts was immaterial because a substantial number of teachers had joined the BAEA negotiating team and the vote on the tentative agreement was only a matter of formality. I disagree because at the time the tentative agreement was reached only 12 teachers out of a possible 44 or 45 teachers were present, not a majority. (FF25, 32j). I also disagree because a tentative agreement can only become a ratified contract after being subject to a vote in a democratic process--adequate notice of the meeting, review of the tentative agreement, discussions and a democratic vote. See finding number 50 for Montana's Requirements for a union to be a democratic organization.

The School District also argues that since there were no mass firings or incidents because some of the teachers did not execute an individual teaching contract, there was no affect in issuing the individual teaching contracts. (FF24). The School District states in a letter to Mr. Keedy that the BAEA had until July 23 to vote on the second full and final offer and if the offer was rejected, the School District would still put the offer into effect on July 24. The same day, July 24, the School District prepared individual teaching contracts. On the evening of July 24, the parties started a mediation session that produced a tentative agreement on early July 25. (FF18, 25).

Looking at the above course of action, the School District was effectively telling the BAEA on July 24 that the teachers were going to work under the wage set forth with or without a mediation session that evening. The School District was effectively telling the BAEA on July 24 that the teachers were going to work for the wages setforth with or without a tentative agreement. The School District was effectively telling the BAEA on July 24 that the teachers were going to work for the wages set-

forth with or without the membership approval of the tentative agreement. The effect of the School District issuing the individual teaching contracts was to tell the teachers that the BAEA may bargain or not, may reach a tentative agreement or not, may vote to accept the tentative agreement or not, but the teachers were going to work under the conditions determined by the School District., Franks Bros Company vs. NLRB, 321 U.S. 702, 14 LRRM 591 (1944)... "The unlawful refusal of an employer to bargain collectively with its employees' chosen representatives disrupts the employees' morale, deters their organizational activities and discourages their membership in unions."

With the parties agreeing the teachers were already employed, with the wages in the individual teaching contracts not being governed by the master labor agreement, with the issuances of the individual teaching contracts being before or during a sensitive mediation session and with the issuing of the individual teaching contracts having the effect of telling the teachers they may do as they wished but the School District would determine the work conditions, I find the School District interfered with the collective bargaining process.

3. CONCLUSIONS OF LAW

For the reasons stated above, I conclude the School district violated section 39-31-401(5) MCA by issuing individual teaching contracts that negate the collective bargaining process.

B. ULP #20-78, Count II

Bypassing the Exclusive Bargaining Agent

1. THE MORE DEFINITE STATEMENT OF THE CHARGE (in part):

> During the week of July 10, 1978, Defendant School Board engaged in individual bargaining with teachers represented by Complainant in that it sent each teacher a copy of the Board's "full and final offer" containing provisions which had not been submitted to Complainant at the bargaining table, as follows:
>
> [Item a.] The parties had tentatively agreed to a "closed" two year contract, to contain specific wages for the second year of the agreement and no opening clause. The "full and

final offer" presented individually to the teachers contained no wage proposal for the second year, and provided an opening clause for second year wages available to either party.

[Item b.] Tentative agreement had been reached on extra duty compensation. The "full and final offer" presented individually to the teachers contained new language on eligibility for extra duty compensation and no dollar amounts for such duties.

[Item c.] The "full and final offer" individually presented to the teachers changed the grievance procedure discussed by the parties at the bargaining table in that it omitted a sentence relating to waiver in Article XII, Section 4.

[Item d.] The "full and final" offer presented individually to the teachers contained a unilateral change, not presented at the bargaining table, in Article XI, Section 2, relating to Emergency and Personal Leave.

This attempt at individual bargaining with the teachers represented by Complainant, by-passing the negotiating committee, constitutes a refusal to bargain in good faith and violates Section 59-1605 (1) (e), R.C.M. 1947 [39-31-401 (5) MCA] as amended.

2. DISCUSSION

There is no question of the existence of the second full and final offer which was mailed to the individual teachers on or about July 10, 1978. (FF10). Also there is no question that the second full and final offer contains language different from earlier offers. (FF5, 10). The question is was different language first discussed and offered to the collective bargaining agent during negotiations?

The School District offered the negotiating committee a proposal on June 28, 1978 which called for the second years' wages and other economic items to be determined by mid-contract negotiations. (FF16, 18, 22a). This was a change from the first full and final offer and agreement on a "closed" two year contract. (FF3, 5, 18). Because these changes were presented at the bargaining table to the BAEA negotiating committee on June 28, I must dismiss item "a" of count II in ULP #20.

Article IX, Section 1 of the first full and final offer is identical to the same section in the second full and final offer. (FF5, 18, 22b). The complaint is the addition of the words

"'certified personnel' covered by this agreement". (FF22b). Therefore, I presume the complaint is not the change in the wording in subdivision 1, Section 2 of Article IX from ".....clearly qualified and eligible employees to" to "....fairly qualified eligible employees". (FF7, 18, 28c).

The second full and final offer contained a dollar amount for extra duty compensation. (FF22c).

Because the "certified personnel" section was presented in the first full and final offer and therefore not new in the second full and final offer, and because the second full and final offer did contain a dollar amount for extra duty compensation, I must dismiss item "b", Count II in ULP #20.

In reference to both items "a" and "b", Mr. Keedy testified that there was little or no discussion or agreement between the parties. This complaint will be covered in Section D, ULP #22-78, Count II.

Both parties agree the Grievance Procedure was not open or subject of negotiations. (FF20a, 22e). I believe the deleted sentence in the Grievance Procedure was a typographical error because two sentences in a row started with the word "Failure". I see no advantage to the School District by deleting the sentence "Failure to file any grievance within such period shall be deemed a waiver thereof". (FF17, 20a). Therefore, a dismissal of item "c", Count II in ULP #20 is in order.

Was the extra sentence part of the discussion of the Article XI, Section 2 proposal added on June 26? The BAEA's complaint states the extra sentence was not presented at the bargaining table. The School District's written proposal on Article XI, Section 2 of June 28 does not contain the extra sentences. (FF16).

The NLRB decision in General Electric Co. (1964) 150 NLRB 194, 57 LRRM 1491 addressed the question of Bypassing the Collec-

tive Bargaining Representative and dealing with the employees directly. In that decision, the NLRB states:

> "Good-faith bargaining thus involves both a procedure for meeting and negotiating, which may be called the externals of collective bargaining, and a bonafide intention, the presence or absence of which must be discerned from the record. It requires recognition by both parties, not merely formal but real that 'collective bargaining' is a shared process in which the right to play an active role. On the part of the employer, it requires at a minimum recognition that the statutory representative is the one with whom it must deal in conducting bargaining negotiations, and that it can no longer bargain directly or indirectly with the employees.....
>
> .....As the Trial Examiner phrased it, the employer's statutory obligation is to deal with the employees through the union, and not with the union through the employees.

Using this for a guideline, if the School District's intention was to deal directly with the individual teachers, the action of the School District would be an unfair labor practice. On June 28, the School District did present a new Article XI, Section 2. (FF16). During the June 28 meeting, the parties did discuss the principal subject of Article XI. Mr. Keedy can not recall the facts of the discussion. (FF22d). Mr. Pederson states there was some confusion about what was presented at the bargaining table so when the School District drafted up their second full and final offer they added one sentence. (FF20b). On July 10, the School District mailed the second full and final offer to the individual teachers. The second full and final offer contains the new Article XI, Section 2 as proposed by the School District plus one extra sentence. (FF18).

With the BAEA not being able to recall the facts of the Discussion on Article XI and with the School District stating there was some confusion about what was presented at the bargaining table, I am not convinced the School District added the extra sentence to their proposal at the June 28 meeting to intentionally bypass the collective bargaining agent. Therefore, I am dismissing item "d" of the Count II in ULP #20.

3. CONCLUSIONS OF LAW

For the reasons stated above, I conclude that the School District did not submit provisions to the individual teachers which had not first been submitted to the complainant at the bargaining table. Therefore, the School District did not violate section 39-31-401 (5) MCA.

C. ULP #22-78, Count 1
Conditional Bargaining

1. THE CHARGE (in part):

> Defendant is violating Section 59-1605 (1) (3) [39-31-401 MCA] by engaging in merely conditional bargaining, which constitutes a refusal to bargain collectively in good faith with complainant, the exclusive representative of defendant's teaching employees.
>
> Bill Pederson, chairman of the Bigfork School Board, issued a news release on or about August 25, 1978 stating that the Board would "bargain again with teachers if the teachers first submit a new written proposal that the Board considers to be sincere".

2. DISCUSSION

The first appearance of a condition being placed on future negotiations was during a conversation after the public meeting on August 21. The condition of August 21 was that the School District would not negotiate until they received a written proposal which they considered sincere. The School District did not hold to that position. (FF29).

The second appearance of a condition being placed on future negotiations was at the termination of the ninth negotiation session on August 22. The condition of August 22 was that the School District would not negotiate until they received a written proposal and then they would only meet if they felt it would be profitable. (FF30). Mr. Pederson agrees the profitable statement means a written proposal that is acceptable to the School District. (FF31).

During the mediation session, via the mediator, Mr. Pederson requested the BAEA to put their proposal in written form because

their proposals were hard to follow and evaluate. (FF31). Mr. Keedy states that the parties mutually understood the outstanding issues and he does not know what he could have done differently. (FF32d).

The last appearance of a condition being placed on future negotiations was contained in a news release by the School District on August 24. The condition of August 24 was that if the BAEA had any further proposals they should submit them in writing to the School District and if the BAEA appeared sincere in their proposals, the School District would meet with the BAEA. (FF34, 32g). The parties have not met again. (FF32i).

Mr. Keedy considered the BAEA's proposals intelligent. (FF32f). Mr. Pederson did not consider the BAEA's proposals sincere. (FF36a).

To the question of reducing a proposal to written form during a mediation session, I am of the opinion that if a written proposal was needed the mediator would have demanded such. Also, the School District's notes of the last mediation session reflect only once, at 12:57 p.m., did the School District request a clarification of a BAEA proposal.

To the question of whether the BAEA's proposals were sincere, the record lacks a charge of surface or regressive bargaining with no intent of reaching an agreement. The record also lacks evidences of surface or regressive bargaining. The end of Section 39-31-305 (2) MCA, Duty to Bargain Collectively in good faith states "Such obligation does not compel either party to agree to a proposal or require the making of a concession." If the Board of Personnel Appeals were to judge the sincerity of a proposal it could be forcing one or both parties to make a concession. The Board of Personnel Appeals can only judge if a proposal was made in a good faith intent to reach an agreement.

The question at hand is may the School District condition

future negotiations on receiving, in advance, a sincere or profitable proposal in their judgement from the BAEA before the School District will negotiate?

The third Circuit Court of Appeals in NLRB vs. George P. Pilling & Sons, Co. (1941) 119 F2d 32; 8 LRRM 557 addressed conditional bargaining:

> .....for Pilling's [Employer] requirement, as a condition precedent to the respondent's bargaining with the union, that the latter first organize the industry in general, and later, that Cort, the union's representative, make known to Pilling the names of the members of the shop committee, Section 7 of the Act [NLRA] guarantees to the employees the right to bargain collectively through a representative of their own choosing and it is not for the employer to restrain or interfere with the exercise of that right by insisting upon unwarranted conditions.

In NLRB vs. C. and J. Camp Inc. (1954), 216 F2d 113, 35 LRRM 2015, The fifth circuit court found a violation of the NLRA where the employer "..... as a condition to meeting with the union for bargaining, that the union agree in advance of the meeting that the demand it had already made would be to some extent abated or lessened."

The NLRB in Valley Oil Co., Inc. (1974) 210 NLRB 370 adopted the administrative law judge's decision which states in part:

> Finally, there is the matter of Respondent's [Employer, after the thirteenth meeting] refusal to meet after the Union's rejection of its final offer unless the Union changed its position. Respondent defends this refusal on the ground that an impasse existed. However, an impasse caused by a party's failure to bargain in good faith is not a legally cognizable impasse and does not justify a refusal to meet. North Land Camps, Inc., 179 NLRB 36. [72 LRRM 1280] I find, therefore, that Respondent's refusal to meet since March 2, 1973, was a further refusal to bargain in violation of Sections 8(a)(5) and (1) of the Act [NLRA].

With Mr. Pederson agreeing a profitable proposal means a proposal that is acceptable to the School District and with the School District's statement in the news release about the BAEA's unacceptable proposals, the School District's sincere or profitable statements can only mean a request for a reduction in the BAEA's demand before the School District would bargain further. Using the NLRB case for a guideline I find the School District

did insist upon an unwarranted condition before the School District would return to the bargaining table.

3. CONCLUSIONS OF LAW

The School District did violate Section 39-31-401(5) MCA by insisting the BAEA first submit a proposal to the School District; if the proposal appeared sincere to the School District or if the negotiations looked profitable to the School District, then the School District would consider a meeting.

D. ULP #22-78, Count II
Impasse

1. THE CHARGE (in part):

> The last negotiating session between the parties was August 22, 1978. At that time both parties made proposals, differing from ones previously on the bargaining table. While none of these were accepted by the other party, they demonstrate movement continues to be possible. However, Chairman Pederson's news release states that "The board's position is that an impasse has been reached".

2. DISCUSSION

The Discussion will first address the question of the negotiability of duty free lunch and preparation time. The discussion will then apply the test for Impasse.

Mr. Pederson stated that duty free lunch and preparation time are policy decisions of the School District and not negotiable. (FF39). The question of the negotiability of duty free lunch and preparation time must be answered first because a party may not insist to impasse on the incorporation, of a permissive subject of bargaining into the collective bargaining contract, NLRB vs. Wooster Division of Borg-Warner (1958) 356 U.S. 342, 42 LRRM 2034.

Montana's Collective Bargaining Act sets forth the following pertinent sections on the question of negotiability:

> 39-31-201. Public employees protected in right of self-organization. Public employees shall have and shall be protected in the exercise of the right of self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours, fringe benefits, and other conditions of employment, and to engage in other concerted

activities for the purpose of collective bargaining or other mutual aid or protection free from interference, restraint, or coercion.

39-31-303. Management rights of public employers. Public employees and their representatives shall recognize the prerogatives of public employers to operate and manage their affairs in such areas as, but not limited to:

(1) direct employees;
(2) hire, promote, transfer, assign, and retain employees;
(3) relieve employees from duties because of lack of work or funds or under conditions where continuation of such work be inefficient and nonproductive;
(4) maintain the efficiency of government operations;
(5) determine the methods, means, job classifications, and personnel by which government operations are to be conducted;
(6) take whatever actions may be necessary to carry out the missions of the agency in situations of emergency;
(7) establish the methods and processes by which work is performed.

39-31-304. Negotiable items for school districts. Nothing in this chapter shall require or allow boards of trustees of school districts to bargain collectively upon any matter other than matters specified in 39-31-305(2).

39-31-305. Duty to bargain collectively - good faith. .....(2) For the purpose of this chapter, to bargain collectively is the performance of the mutual obligation of the public employer or his designated representatives and the representatives of the exclusive representative to meet at reasonable times and negotiate in good faith with respect to wages, hours, fringe benefits, and other conditions of employment or the negotiation of an agreement or any question arising thereunder and the execution of a written contract incorporating any agreement reached. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

The Kansas Supreme Court in N.E.A vs. Shawnee Mission Board of Education (1973) 512 P2d 426, 84 LRRM 2223 setforth the following balance between the scope of bargaining and management rights:

> It does little good, we think, to speak of negotiability in terms of "policy" versus something which is not "policy". Salaries are a matter of policy, and so are vacation and sick leaves. Yet we cannot doubt the authority of the Board to negotiate and bind itself on these questions. The key, as we see it, is how direct the impact of an issue is on the well-being of the teachers, as opposed to its effect on the operation of the school system as a whole. The line may be hard to draw, but in the absence of more assistance from the legislature the courts must do the best they can. The similar phraseology of the N.L.R.A. has had a similar history of judicial definition. See Fibreboard Corp., v. Labor Board, 379 U.S. 203, 13 L.Ed. 2d 233, 85 S. Ct. 398, 57 LRRM 2609 and especially the concurring opinion of Stewart, J. at pp. 221-222. [Emphasis Added]

The Pennsylvania Public Employees Relation Act (Act 195) contains the following Sections:

> Section 701. [Scope of Bargaining]. Collective bargaining is the performance of the mutual obligation of the public employer and the representative of the public employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder and the execution of a written contract incorporating any agreement reached but such obligation does not compel either party to agree to a proposal or require the making of a concession.
>
> Section 702. [Managerial Policy]. Public employers shall not be required to bargain over matters of inherent managerial policy, which shall include but shall not be limited to such areas of discretion or policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel. Public employers, however, shall be required to meet and discuss on policy matters affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by public employee representatives.

In Pennsylvania Labor Relation Board vs. State College Area School District (1974-75) 337 A2d 262, 90 LRRM 2081, the Pennsylvania Supreme Court used the Kansas Supreme Court test to strike a balance between Section 701 and 702. The Pennsylvania Supreme Court stated:

> Thus we hold that where an item of dispute is a matter of fundamental concern to the employees' interest in wages, hours and other terms and conditions of employment, it is not removed as a matter subject to good faith bargaining under section 701 simply because it may touch upon basic policy....

This Kansas-Pennsylvania balancing test was used by the Board of Personnel Appeals in Florence-Carlton, DLP #5-77.

The Nevada's State Public Employment Relations Act has two Sections similar to Montana's Section 39-31-303 and 39-31-305 (2) MCA:

> "288.150 Negotiations by employer with recognized employee organization concerning wages, hours and conditions of employment; rights of employer without negotiation.
> "1. It is the duty of every local government employer, except as limited in subsection 2, to negotiate in good faith through a representative or representatives of its own choosing concerning wages, hours, and conditions of employment with the recognized employee organization, if any, for each appropriate unit among its employees. If either party requests it, agreements so reached shall be reduced to writing. Where any officer of a local government employer,

other than a member of the governing body, is elected by the people and directs the work of any local government employee, such officer is the proper person to negotiate, directly or through a representative or representatives of his own choosing, in the first instance concerning any employee whose work is directed by him, but may refer to the governing body or its chosen representative or representatives any matter beyond the scope of his authority.

"2. Each local government employer is entitled, without negotiation or reference to any agreement resulting from negotiation:

(a) To direct its employees;

(b) To hire, promote, classify, transfer, assign, retain, suspend, demote, discharge or take disciplinary action against any employee;

(c) To relieve any employee from duty because of lack of work or for any other legitimate reason;

(d) To maintain the efficiency of its governmental operations;

(e) To determine the methods, means and personnel by which its operations are to be conducted; and

(f) Take whatever actions may be necessary to carry out its responsibilities in situations of emergency.

"Any action taken under the provisions of this subsection shall not be construed as a failure to negotiate in good faith." (At 88 LRRM 2775, NOTE: The above sections were later amended).

In Clark County School District vs. Local Government Employees - Management Relation Board (1974) 530 P2d 114, 88 LRRM 2774, the Nevada Supreme Court approved the following balance between Section 1 and 2:

> In this case the EMRB concluded that the applicable standard to reconcile Section 1 and 2 is that the government employer be required to negotiate if a particular item is found to significantly relate to wages, hours and working condition even though that item is also related to management prerogative. The standard and the findings thereon are reasonable.

Looking at the duty free lunch provisions (Article VII Section 4) in the 1976-78 Labor contract, in the tentative agreement and during the last negotiation session, the section provides either that no teacher, or teachers on a rotating basis, shall be required to supervise students in the lunchroom. The section also provides for playground duty. (FFI, 26, 30).

All Bigfork teachers are paid on a yearly pay matrix, not an hourly wage rate. A teacher's wage is determined by the teacher's experience and education fitted into the pay matrix. If we remove the duty free lunch provision from the labor contract, the

teachers who are assigned lunchroom work in addition to their regular required work would have an increase in the number of hours worked for the same yearly salary.

Looking at the preparation time provision (Article VII, Section 5) in the 1976-78 labor contract, in the tentative agreement and during the last negotiation session, the section requires a given amount of time during the day to be set aside for preparation of class materials. (FF1, 26, 30). If we remove the preparation time from the labor contract, the teacher would do this preparation work at home. The preparation work done at home would increase the number of hours worked for the same yearly salary. Like lunch duty, non-scheduled preparation time would increase the number of hours worked for the same salary, therefore becoming nonpay hours.

With the amount of time required for lunch duty and preparation being a balance against a yearly salary, I can only see these items as having a direct impact on the well-being of the individual teachers. Therefore, duty free lunch and preparation time are negotiable items.

There is no question that the School District called an impasse in a news release on August 24. (FF34). In the School District's notes of the ninth negotiation session, there is no reference to impasse (FF30). Compare the notes of the June 28 meeting and the following letter on July 10 in which the School District states impasse loud and clear. (FF16,18). Did impasse exist at the end of the ninth negotiation session on August 22 as stated by the School District on August 24?

The Board of Personnel Appeals adopted two tests for impasse in Columbia Falls, ULP #25, 26, 27 and 36,1976. Also See: Helena Fire Fighters, ULP #19-78. The first test is from the NLRB and the courts acceptance of impasse where negotiations have been frequent, numerous and exhausting. See: NLRB vs. Intra-

Coastal terminal, Inc., 286 F2d 945, 47 LRRM 2629; Celanese Corp. of America, 95 NLRB 664, 28 LRRM 1362.

The School District's notes of the last negotiation session reflect the outstanding issues of duty free lunch, health insurance cost, and preparation time. It appears from the School District's question at 12:57 and Mediator Skaar's statement, the issue of duty free lunch was near settlement. (FF30). Have the parties exhausted all possible ways of funding the health insurance cost and all possible ways of providing preparation time? The record is silent on whether the parties explored other formulas for funding health insurance cost, e.g. the School District will increase its contribution to the health insurance by "X" percentage this year and by "Y" percentage next year non-compounded. The BAEA decreased its demand from 2½ hours per week for preparation time to 2 hours. The BAEA also proposed that all 2 hours of preparation time could be used in one block. (FF30).

The School District offered one hour per week for preparation time. (FF30, 26). But, at no time did the parties explore the possibility of dividing the difference in preparation time, or the reasons why a party needs more or less preparation time.

The record is lined with signs that the School District was not willing to exhaust every avenue of discussion in order to reach a mutual understanding and a mutual agreement. The School District issued its first full and final offer the day following the third negotiation session. But at the conclusion of the third session, a number of items remained unresolved. The first full and final offer also requested a vote of the teachers before a tentative agreement. (FF3, 4). The factfinder's report states that the School District argued that it had the ability to pay a base salary of $9227 without risking another budgetary levy. But at the next session, the School District stated that it could

only pay $9058 because of the mill levy failure. (FF13, 16). Looking at the School District's second full and final offer, Mr. Keedy testified that no agreement had been reached and/or discussion taken place with respect to certain provisions of both the first and second full and final offers. (FF22b). With the School District passing out full and final offers and not exploring the offers or alternative offers freely and truthfully with the BAEA, I am of the opinion that the School District did not exhaust every avenue of understanding and had no intent of doing so in order to reach a mutual agreement.

The second test for impasse is one modified from Taft Broadcasting Co. (1967) 163 NLRB 475, 64 LRRM 1386; employer petition for review dismissed 395 F2d 622, 65 LRRM 2292.

> Whether a bargaining impasse exists is a matter of judgment. Things which must be considered are:
>
> a. The bargaining history,
>
> b. The good faith of the parties in negotiation,
>
> c. The length of the negotiation i.e. frequent, numerous, exhausting-exploring all grounds of settlement,
>
> d. The importance of the issue or issues as to which there is disagreement i.e. mandatory subject of bargaining,
>
> e. The contemporaneous understanding of the paties as to the state of negotiations i.e. positions solidified,
>
> f. Has mediation or fact finding been requested. What have been the actions of the fact finder or the mediator?

Application of the impasse test:

a. The record contains no past bargaining history.

b. The School District did not negotiate in good faith by imposing conditions on further negotiations at the termination of negotiations early August 23. (FF30). The School District did not declare impasse until the following day. (FF34). Also see Section C. ULP #22, Count I above.

c. The parties have met nine times in negotiations from early December 1977 to late August 1978. (FF2, 30). I do not believe the parties have met frequent and numerous times.

d. Preparation time, health insurance cost and duty free lunch are all mandatory subjects of negotiations.

e. At no time did Mr. Pederson state the parties were solidified in their positions. In fact at the last meeting, both parties made different proposals. Concessions were made. (FF31, 32b). Mr. Pederson's only reason for calling an impasse was that BAEA's proposals, in the School District's Judgement, were not sincere. (FF36) With the BAEA willing to settle for less wages than the School District offer in order to provide duty free lunch and preparation time for teachers in grades 1 through 6 and to provide an increase in health insurance premiums paid by the School District for all teachers, I do not believe the parties are solidified in their positions. (FF30, 32, 34, 36, 37). Mr. Keedy stated the parties were moving closer and closer to an agreement with each passing hour. (FF38c).

f. Mediator Skaar did not believe the parties were at impasse because she was trying to continue mediation the next evening. (FF30).

The School District implemented its third full and final offer which contained the latest School District concessions. (FF 33, 41, 42).

With the parties not fully exploring all grounds for settlement, with the School District acting in bad faith by imposing conditions on future negotiations, with the positions of the parties not fixed and with the mediator trying to continue mediation, I do not believe impasse existed in late August.

3. CONCLUSIONS OF LAW

The School District violated Section 39-31-401(5) MCA by declaring impasse when impasse did not exist.

E. ULP #25-78

Withdrawal of Recognition and Refusing to Bargain

1. THE CHARGE (in part):

> Defendant has violated the Pubic Employees Collective Bargaining Act, Section 59-1605(1)(e), R.C.M. 1947 [Section 39-31-40 1(5) MCA].
>
> On or about September 15, 1978, Defendant, in a special meeting of the Board of Trustees, took action to withdraw continued recognition of the charging party and to refuse any bargaining whatsoever with the charging party.

A closely related charge is the first half of ULP #26-78, which states in part:

> Defendant has violated the Public Employees Collective Bargaining Act, Section 59-1605 (1) (b), 59-1605 (1) (a) and 59-1605 (1) (e), R.C.M. 1947 [Section 39-31-401 (2), (1) and (5) MCA].
>
> On or about July, continuing through September, 1978, the Employer interferred with, restrained and coerced employees in the exercise of the rights guaranteed in Section 59-1603 [Section 39-31-201 MCA] of this Act;
>
> On or about September 16, 1978, the Employer interferred with the administration of the Bigfork Area Education Association and has dominated and assisted in the formation of an alleged labor organization for the purposes of withdrawing recognition of the Bigfork Area Education Association.

This charge will be considered at this time in relationship to withdrawal of recognition.

2. Discussion.

On August 29, Mr. Keedy requested the resumption of negotiations but, neither Mr. Keedy or the BAEA received a reply. (FF39,40). Early in September, a decertification Petition was circulated among the teachers to decertify the BAEA by the BTA. The Petition was executed by 23 out of 44 or 45 Bigfork teachers. The Petition was delivered to the School District on September 6. (FF43, 32j). On September 7, the BTA requested the School District to recognize them as exclusive bargaining representative and the BTA requested negotiations be opened as soon as possible. (FF44). On September 12, representatives of the School District decided to meet with the BTA and file an Employer's Petition with the Board of Personnel Appeals. (FF45, 46). On September 15, the School Board at a special meeting voted to recognize the BTA and open negotiations. The School District's intent was to withdraw recognition from the BAEA. (FF48). The School District also setforth that the BAEA was a voluntarily recognized bargaining representative. (Defendant's Reply Brief, P18 (17-19)).

By not replying to Mr. Keedy's request, the School District did refuse to bargain with the BAEA. (FF40).

Because the Board of Personnel Appeals has no case history on withdrawal of recognition coupled with a refusal to bargain, the Board of Personnel Appeals will use the NLRB for guidance. State Department of Highways vs. Public Employees Craft Council, supra. Section 7 (Rights of Employees, 29 U.S.C.A. Sec. 157), Section 8(a)(1) (interfere with, restrain, or coerce employees in exercise of rights guaranteed in Sec. 7, 29 U.S.C.A. Sec. 158(1)), Section 8(a)(5) (Refusal to Bargain, 29 U.S.C.A. 159(5)), Section 9(d) (Duties of the Parties in Collective Bargaining 29 U.S.C.A. Sec. 158 (d)) and Section 9(c)(1)(A) & (B) (Representatives and Elections, 29 U.S.C.A. Sec. 159(c)) of the NLRA are equivalent to Section 39-31-201 (Public Employees Protection in Right of Self-organization), Section 39-31-401-1 (interfere, restrain and

coerce employees), Section 39-31-401-5 (Duty to Bargain Collectively) and Section 39-31-207 (Petition on Representation Question) of MCA.

The Third Circuit Court of Appeals in NLRB vs. Frick Co. (1970) 423 F2d 1327, 73 LRRM 2889, the Ninth Circuit Court in NLRB vs. Denham (1972) 469 F2d 239, 81 LRRM 2697 (vacated Judgement and Remanded on other Points; 411 U.S. 945, 82 LRRM 3184) and U.S. District Court, District of New Jersey in Hirsch vs. Pick-Mt. Laurel Corp. (1977) 436 F supp 1342, 96 LRRM 2255 has ruled that the withdrawal of recognition from a union that was voluntarily recognized should be governed by the same standards as the withdrawal of recognition from a Board-certifed union.

In NLRB vs. Frick, supra, the Third Circuit Court has set forth the requirements for withdrawal of recognition and refusing to bargain:

> The Board's [NLRB] holding that the Company violated the Act when it withdrew recognition of the Union rests in the first instance on the rules of the Board respecting the establishment and continuance of bargaining relationships. Where a bargaining relationship has been properly established either by Board certification or as here, by voluntary recognition, the representative status of the Union is presumed to continue for a reasonable period and the presumption is irrebuttable. Brooks v. NLRB 348 U.S. 96, 103-104, 35 LRRM 2158 (1954); Keller Plastics, Inc., 157 NLRB 583, 61 LRRM 1396 (1966).
>
> In the case of a certified union the reasonable time during which its majority status may not be challenged is ordinarily one year. Brooks v. NLRB, supra, at 98; NLRB v. Little Rock Downtowner, Inc., 414 F.2d 1084, 1090, 72 LRRM 2044 (8 Cir. 1969). And although a presumption of majority status continues after one year, it then becomes rebuttable. In such circumstances an employer may refuse to bargain without violating the Act "if but only if, he in good faith has a reasonable doubt of the Union's continuing majority." Laystrom Manufacturing Co., 151 NLRB 1482, 1483-1484, 58 LRRM 1624 (1965), enforcement denied on other grounds, 359 F.2d 799, 62 LRRM 2033 (7th Cir. 1966); accord NLRB v. Rish Equipment Co., supra, note 5, 407 F.2d at 1101, 70 LRRM 2904. An employer must, however, come forward with evidence casting "serious doubt on the union's majority status." Stoner Rubber Co., 123 NLRB 1440, 1445, 44 LRRM 1133 (1959). As the court said in NLRB v. Rish Equipment Co., supra, note 5, 407 F.2d at 1101, 70 LRRM 2904: "'[M]ore than an employer's mere mention of [its good faith doubt] and more than proof of the employer's subjective frame of mind'...[is necessary.] What is required is a 'rational basis in fact.'" (at 73 LRRM 2890-2891)

The Ninth Circuit Court in NLRB vs. Tangeniew, Inc. and Consolidated Hotels (1972) 470 F2d 669, 81 LRRM 2339 stated that the objective evidences submitted by the company must be "clear, cogent and convincing evidence." The Fifth Circuit Court in J. Ray McDermott & Co. Inc. vs. NLRB (1978) 571 F2d 850, 98 LRRM 2191 states:

> The kind of "objective evidence" ordinarily sufficient to overcome a rebuttable presumption of majority support would be greater than fifty percent employee support for a decertification petition. Automated Business Systems v. NLRB, 6 Cir. 1974, 497 F.2d 762, 86 LRRM 2659, or thirty percent support for decertification combined with other indicia of non-support, National Cash Register Co. v. NLRB, 8 Cir. 1974, 494 F.2d 189, 85 LRRM 2657.

Using the above NLRB cases for a guideline, the question of BAEA's majority status is timely because the BAEA was exclusive bargaining representative for the Bigfork teachers from at least 1976. (FF1). The employer did present sufficent objective evidence to have good faith doubt about BAEA's majority status by presenting the BTA's decertification Petition which contained the signatures of 23 out of 44 or 45 teachers. (FF43).

However, if I were to uphold the employer's action without taking into account the unfair labor practices in ULP #22-78, I would be side-stepping a major labor principle.

The U.S. Supreme Court in Medo Photo Supply Corporation vs. NLRB (1944) 321 U.S. 679, 14 LRRM 581 at 585 states:

> Petitioner [Employer] cannot, as justification for its refusal to bargain with the union, set up the defection of union members which it had induced by unfair labor practices, even though the result was that the union no longer had the support of a majority. It cannot thus, by its own action, disestablish the union as the bargaining representative of the employees, previously designated as such of their own free will. Labor Board v. Bradford Dyeing Ass'n, 310 U.S. 318, 339-340 [6 LRR Man. 684]; International Ass'n. of Machinists v. Labor Board, supra, 82; of National Licorice Co. v. Labor Board, supra, 359. Petitioner's refusal to bargain under those circumstances was but an aggravation of its unfair labor practice in destroying the majority's support of the union, and was a violation of Subsection 8(1) and (5) of the Act [NLRA].

The fifth circuit court in NLRB vs. A.W. Thompson, Inc. (1971) 449 F2d 1333, 78 LRRM 2593 at 2596 states:

> A bargaining order is appropriate even in the absence of proof that the Union's loss of majority was attributable to the unfair labor practices which had been perpetrated by the Company. In N.L.R.B. v. Movie Star, Inc., 5 Cir., 1966, 361 F.2d 346, 62 LRRM 2234, we found that "[w]hile it may be that at some earlier point in time the Respondents might have validly asserted a good-faith doubt as to the Union's majority status, they did nothing to dispute that majority status until August 28, when the course of conduct found by the Board to have been violative of the Act was in high gear. The effect of Respondents' numerous Section 8(a)(1) violations was to transform a possible good-faith doubt of the Union's majority into a bad-faith virtual certainly." 361 F.2d at 351.
>
> More recently, in J.P. Stevens & Co., Inc., Gulistan Div. v. N.L.R.B., 5 Cir., 1971, 441 F.2d 514, 76 LRRM 2617, we recognized as did the Trial Examiner herein, that many of the employees of the Company might not have been affected by the Company's unfair labor practices, and that many of the employees, in the exercise of their free choice would not choose the Union in any event. "But the Board's evaluation of the propriety of a bargaining order cannot be based on employee motivations, determined individual by individual. We cannot require the Board to engage in the hopeless and impossible task of evaluating the subjective reasons for each employee recantation." 441 F.2d at 527. The Trial Examiner found that "the loss of majority caused in whole or in part by Respondent's unfair labor practices does not justify its refusal to bargain and, under the circumstances, the Respondent cannot be said to have entertained a good-faith doubt as to the Union's majority status. To hold otherwise would result in permitting Respondent to profit from its own unlawful refusal to bargain."

In ULP #22-78, on August 23 and 24, the School District violated Section 39-31-401(5) MCA by conditioning future negotiations on the receipt of an offer, in the School District's judgement, that is sincere or profitable. Also in ULP #22-78, the School District declared impasse when no impasse existed. In ULP #33-78, on August 31, the School District violated Section 39-31-401(5) MCA by making unilateral changes in working conditions that were items of negotiation and before impasse was reached. The above unfair labor practices would naturally disrupt the bargaining unit employees' morale, deters their organizational activities and discourages their membership in the BAEA. Franks Bros. supra.

The next day after the third negotiation session, the School District issued their first full and final offer while many items remained unresolved. (FF3, 4). The School District may have not

been honest when telling the factfinder that they could pay $9,227 without risking another budget levy, but then at the next meeting the School District stated they could only pay $9,059 because of the mill levy failure. FF(13, 16). During the last negotiation session, when a member of the BAEA negotation team asked for some guarantee of free time (duty free lunch, personal leave) and would like some idea of a schedule, Mr. Pederson replied that if it was dropped from the contract the administration and the teachers could work out some schedule. (FF30 at 8:30 p.m.) When the BAEA proposed a reduction in the School District's offer in schedule B (extra duty pay) to standard 7%, the School District replied we already have personnal working and that change would be inconsistent with our full and final offer. (FF30 at 10:48). The above incidents would be very frustrating to the members of any bargaining unit.

The membership of a labor organization facing all the above actions of the School District would feel very frustrated and helpless in the negotiation processes. Because of the frustrations, the teachers would naturally become disillusioned with the ineffectiveness of the BAEA which was caused by the School District's multiple ULP's and other actions. Therefore, I conclude that the loss of majority status was due to the employer's actions. This conclusion is also based on the lack of evidences that no decertification petition was present until after the employers action in August. To let the School District withdraw recognition and refuse to bargain with the BAEA, would be letting the School District profit from their own wrong doing and would be stating that conditional bargaining, declaring non-existing impasse, making unilateral changes in working conditions and other School District actions had no affect on the bargaining unit.

3. CONCLUSION OF LAW.

The School District violated Section 39-31-401(1) and (5) by withdrawing recognition from the BAEA and refusing to bargain with the BAEA.

F. ULP #25-78

Recognizing and Bargaining with the BTA

1. The charge (in part):

> Defendant has violated the Public Employees Collective Bargaining Act, Section 59-1605(1)(b), 59-1605(1)(a) and 59-1605(1)(e), R.C.M. 1947 [Section 39-31-401(2), (1) and (5) MCA].
>
> On or about September 16, 1978, the Employer interferred with the administration of the Bigfork Area Education Association and has dominated and assisted in the formation of an alleged labor organization for the purposes of withdrawing recognition of the Bigfork Area Education Association. The action of the Employer is contrary to the Rules of the Board of Personnel Appeals which requires a fair election of such employees before the exclusive bargaining representative can be changed. Upon information and belief the Employer has negotiated with the alleged labor organization and has reached a collective bargaining agreement which should be of no force and effect since the Bigfork Area Education Association is still the exclusive bargaining representative. [Emphasis added].

2. DISCUSSION

The BTA delivered a decertification petition to the School District which contained the signatures of 23 out of 44 or 45 Bigfork teachers. (FF43). The BTA requested recognition and negotiations. (FF44). The School District did recognize, negotiate and reached a tentative agreement with the BTA. (FF48, 49).

Once again, the Board of Personnel Appeals will look to the NLRB cases for guidance.

The NLRB has developed a policy that calls for an employer to remain neutral when faced with a claim of majority status from two or more competing unions. This policy is set forth in the Midwest Piping Doctrine, Midwest Piping Co., Inc. (1945) 63 NLRB 1060, 17 LRRM 40. The NLRB's new version of this Doctrine is stated in Shea Chemical Corp. (1958) 121 NLRB 1027, 42 LRRM 1486, which states in part at 1487-1488:

> We [NLRB] now hold that upon presentation of a rival or conflicting claim which raises a real question concerning representation, an employer may not go so far as to bargain collectively with the incumbent (or any other) union unless and until the question concerning representation has been settled by the Board.
>
> However, we wish to make it clear that the Midwest Piping doctrine does not apply in situations where because of contract bar or certification year or inappropriate unit or any other established reason, the rival claim and petition do not raise a real representation question.

The Fifth Circuit Court in NLRB vs. Western Commercial Transportation, Inc. (1973) 487 F2d 332, 84 LRRM 2815 setforth the following guidelines where an employer recognized and negotiated with a rival union that presented designation cards signed by 89 out of 162 unit employees, a violation of the NLRA:

> An employer who assumes the responsibility of deciding which of two rival unions represents his employees assumes also the risk that the Board will find a genuine issue of representation and an unfair labor practice in his lack of neutrality. The Company could have avoided this result by petitioning the Board for an election under Section 9(c) (1) (B) of the Act. See NLRB v. Hunter Outdoor Products, Inc., 440 F.2d 876, 880, 76 LRRM 2969 (1st Cir. 1971); NLRB v. Signal Oil & Gas Co., supra, at 788 n.3.
>
> NLRB v. Gissel Packing Co., 395 U.S. 575, 71 LRRM 2481 (1969), does not mandate otherwise. That case upheld the Board's authority to find violation of Section 8 (a) (5) until the Board determines that a representation question does not exist. NLRB v. Downtown Bakery Corp., 330 F.2d 921, 928, 56 LRRM 2097 (6th Cir. 1964); NLRB v. Signal Oil & Gas Co., supra, at 788 n.3.
> ENFORCED. (at 2815).

In a like case, the Fifth Circuit Court set forth the facts of the case and outlined the effect of the employer's action on the employees' rights, Oil Transport Co. vs. NLRB (1971) 440 F2d 664, 76 LRRM 2609:

> The only issue requiring discussion is the Board's conclusion that the Company also violated 8 (a) (1) and (2) by recognizing and contracting with UTE (Union of Transportation Employees) at a time when there was a real question of representation between UTE and a rival union, the Teamsters, who also were engaged in an effort to organize the company. In such a situation, the employer has a duty of strict neutrality. He may not determine for his employees the question of representation, thereby avoiding the orderly procedures required for determination of that question. In NLRB v. Signal Oil & Gas Co., 303 F.2d 785, 50 LRRM 2505 (5th Cir. 1962), this Circuit has discussed at length the obligation of the employer where there are competing unions and the situation [has] not crystallized," not to exert influence thereby tipping the scales and "depriving the

employees of their right to select their representative in a free contest between the rival organizations." Id. at 787; see also Midwest Piping & Supply Co., 63 NLRB 1060, 17 LRRM 40 (1945).

When the company negotiated with UTE, it was proffered 50 cards from a unit of 80. The president rejected one card and found the other 49 valid on the basis of personal recollection of signatures. Ultimately it developed that six of the 49 cards were signed by employees who signed Teamster cards after signing UTE cards. The Board declined to rest its decision of premature recognition on the finding of the Trial Examiner that UTE did not represent an uncoerced majority. The Board was not required, as a prerequisite to existence of a real question of representation, to conclude that UTE was in a minority status. Moreover, the issue of whether there is a real question of representation may not be resolved by application of only a mathematical approach, NLRB v. Clement Bros. Co., 407 F.2d 1027, 70 LRRM 2721 (5th Cir. 1969), although, of course, the existence or nonexistence, and the size of, an uncoerced majority [emphasis added] are relevant considerations in determining if there was a substantial question of representation as between the two unions. Considering all the evidence, we are unable to say that there is not substantial evidence supporting the Board's conclusion.

By withholding recognition and negotiation from two competing unions, the employer is also in compliance with Garment Worker's Union vs. NLRB (1961) 366 U.S. 731, 48 LRRM 2251. The above cases do not mean the employer must stop negotiating with the recognized union because a rival union or group of employees files a decertification petition which does not infer a good faith doubt of majority status.

A teacher requested to sign a decertification petition may feel considerable peer pressure. Because of this pressure, the teacher may sign the petition although he would vote differently in a secret ballot election. The possibility of this happening is so paramount that the employer should not negotiate with the challenging union.

If the School District would have remained neutral, the School District would have not violated the above guidelines.

3. CONCLUSIONS OF LAW

The School District violated Section 39-31-401 (1) and (2) MCA by recognizing and negotiating with the BTA when there was a real question of majority status, by interferring, and restraining

the Big Fork teachers in the selection of their collective bargaining representative and by dominating, and assisting in the formation of a labor organization, the BTA.

G. ULP #33-78

Unilateral Changes in Working Conditions

1. The charge (not heard at the hearing but stipulated into the discussion):

> Employer has instituted unilateral changes in working conditions, although the parties are still in negotiations for a contract for 1978-79 and impasse has not been reached. The expired contract provided that elementary teachers would have a 45 minute period lunch period. Past practice established that this meant an uninterrupted continous period of 45 minutes. Effective December 4, 1978 the Defendant's administration announced it would require all elementary teachers to spend 15 minutes supervising the playground during the lunch period. In past years teachers have been paid an additional stipend for noontime playground duty. This year no extra duty pay is provided for this additional work. These are unilateral changes in working conditions constituting per se violations of the statutory duty to bargain in good faith in violation of Section 59-1605 (1) (a) and (e), R.C.M. 1947 [Section 39-31-401 (1) and (5)].

2. DISCUSSION

The School District declared an impasse on August 24 after calling a halt to negotiations early on August 23. (FF34, 38). Mr. York advised the School District to implement the third full and final offer. (FF33). On August 30th the School District ordered the implementation of the third full and final offer which contained unsettled points of negotiations. (FF41). The third full and final offer was passed out to the teachers and the teachers were informed that they would be working under the conditions in the offer. (FF42).

I found no impasse as declared by the School District in ULP #22-78 count II.

The School District made unilateral changes in working conditions that were items for negotiation and before impasse was reached, thereby, violating Section 39-31-401(5) MCA. NLRB vs. Katz (1962) 369 U.S. 736, 50 LRRM 2177. In the charge the BAEA appears to be alleging that the School District increased the

teachers duties to the full requirements of the third full and final offer on or about December 12. In Aztec Ceramics Co. (1962) 138 NLRB 1178, 51 LRRM 1226; Carter Lake Machinery Co. (1961) 131 NLRB 1106, 48 LRRM 1211; Yale Upholstering Co. (1960) 127 NLRB 440, 46 LRRM 1031, the NLRB has held this action to be a violation of the NLRA.

3. CONCLUSION OF LAW

The School District did violate Section 39-31-401(5) MCA by implementing unilateral changes in working conditions that were unsettled points in negotiations and before impasse was reached.

V. Remedy

1. The remedy authority of the Board of Personnel Appeals.

Section 39-31-406 (4) MCA set forth the remedy authority of the Board of Personnel Appeals as follows:

> If, upon the preponderance of the testimony taken, the board is of the opinion that any person named in the complaint has engaged in or is engaging in an unfair labor practice, it shall state its findings of fact and shall issue and cause to be served on the person an order requiring him to cease and desist from the unfair labor practice and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this chapter. The order may further require the person to make reports from time to time showing the extent to which he has complied with the order. No order of the board shall require the reinstatement of any individual as an employee who has been suspended or discharged or the payment to him of any back pay if it is found that the individual was suspended or discharged for cause.

The NLRB's remedy authority is setforth in Section 10(c) NLRA, 29 U.S.C.A. Sec. 160 (2) as follows in part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, that where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him...

From the above, I judge that the NLRB and the Board of

Personnel Appeals have equivalent remedy authority.

2. Remedy for ULP #33-78, Unilateral changes in working conditions.

Because I have no record of what or when the unilateral changes were made I can only ask the parties to meet as required by the Board Order of February 1979 and attempt to fashion an agreeable remedy. At the end of 10 days, if the parties have not agreed on a remedy, they are each to submit their respective positions along with appropriate case law for further processing by the Board. If the parties are able to reach an agreement on remedy, they are to jointly report the remedy to the Board of Personnel Appeals.

3. Remedy for ULP #26-78, bargaining with the BTA.

In Western Commercial Transport (1973) 201 NLRB No. 10, 82 LRRM 1366 (Enforced, supra), the NLRB states:

> Order: Cease and desist from recognizing, bargaining with, or enforcing or maintaining contract with Tank Line Union [rival union] unless and until certified; in any like or related manner interfering with employees' LMRA [NLRA] rights. Withdraw and withhold recognition from Tank Line Union unless and until certified; set aside existing contract with Tank Line Union; post notice. [at 82 LRRM 1368].

The NLRB ordered approximately the same remedy in Oil Transport Co. (1970) 182 NLRB No. 148, 74 LRRM 1259 (enforced, supra).

4. Remedy for ULP #25-78, withdrawal of recognition.

In NLRB vs. A.W. Thompson, Inc., supra, the Fifth Circuit Court states, "A bargaining order is appropriate even in the absence of proof that the union's loss of majority was attributable to the unfair labor practices which had been perpetrated by the company. [at 78 LRRM 2596]". The U.S. Supreme Court in Franks Bros. Company vs. NLRB supra, approved bargaining orders and stated:

> Out of its wide experience, the Board has many times expressed the view that the unlawful refusal of an employer to bargain collectively with its employees' chosen representatives disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions. The Board's study of this problem has led it to conclude that, for these reasons, a requirement that union

membership be kept intact during delays incident to hearings would result in permitting employers to profit from their own wrongful refusal to bargain...

That determination the Board has made in this case and in similar cases by adopting a form of remedy which requires that an employer bargain exclusively with the particular union which represented a majority of the employees at the time of the wrongful refusal to bargain despite that union's subsequent failure to retain its majority. The Board might well think that, were it not to adopt this type of remedy, but instead order elections upon every claim that a shift in union membership had occurred during proceedings occasioned by an employer's wrongful refusal to bargain, recalcitrant employers might be able by continued opposition to union membership indefinitely to postpone performance of their statutory obligation. In the Board's view procedural delays necessary fairly to determine charges of unfair labor practices might in this way be made the occasion for further procedural delays in connection with repeated requests for elections, thus providing employers a chance to profit from a stubborn refusal to abide by the law. That the Board was within its statutory authority in adopting the remedy which it has adopted to foreclose the probability of such frustrations of the Act seems too plain for anything but statement. See 29 U.S.C. 160(a) and (c). (At 14 LRRM 592-593).

The above case was referenced by the U.S. Supreme Court in Medo Photo Supply Corporation vs. NLRB, supra, as controlling where an employer had induced unfair labor practices and the union no longer had majority support. The NLRB ordered bargaining with the union with minority support.

The BTA's petition for decertification should be dismissed. This is based on Bishop vs. NLRB (1974) 502 F2d 1024, 87 LRRM 2524 in which the Fifth Circuit Court set forth the following theory:

If the employer has in fact committed unfair labor practices and has thereby succeeded in undermining union sentiment, it would surely controvert the spirit of the Act to allow the employer to profit by his own wrongdoing. In the absence of the "blocking charge" rule, many of the NLRB's sanctions against employers who are guilty of misconduct would lose all meaning. Nothing would be more pitiful than a bargaining order where there is no longer a union with which to bargain.

Nor is the situation necessarily different where the decertification petition is submitted by employees instead of the employer or a rival union. Where a majority of the employees in a unit genuinely desire to rid themselves of the certified union, this desire may well be the result of the employer's unfair labor practices. In such a case, the employer's conduct may have so affected employees attitudes as to make a fair election impossible. NLRB v. Kaiser Agricultural Chemicals, 5 Cir. 1973, 473 F.2d 374, 82 LRRM 3455.

If the employees' dissatisfaction with the certified union should continue even after the union has had an opportunity to operate free from the employer's unfair labor practices, the employees may at that later date submit another decertification petition. The Supreme Court stressed in Gissel, supra, that:

> There is...nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so... [There is in such a case] no 'injustice to employees who may wish to substitute for the particular union some other...arrangement' [but] a bargaining relationship 'once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed', after which the 'Board may,...upon a proper showing take steps in recognition of changed situations which might make appropriate changes in bargaining relationships.' Franks Bros. v. N.L.R.B., 1944, 321 U.S. 702, 705-706, 64 S.Ct. 817, 88 L.Ed.2d 1020, 1023, 14 LRRM 591. (at 87 LRRM 2527 & 2528).

I adopted the above theory and order the School District to bargain in good faith with the BAEA upon reasonable demand.

VI. Recommended Order

The School District is ORDERED to cease and desist in violating Sections 39-31-401 (1), (2) and (5) MCA and from interferring, restraining, and coercing the Bigfork teachers in the exercise of their rights guaranteed under Section 39-31-201 MCA by:

1. Issuing individual teaching contracts that were not governed by and secondary to the master labor agreement in the areas of wages, hours, fringe benefits, and other conditions of employment,
2. Issuing individual teaching contracts that interferred with the collective bargaining process,
3. Refusing to negotiate with the BAEA on the conditions that the BAEA must first propose an offer that is, in the School District's judgement, sincere or profitable before the School District will consider negotiating,
4. Calling an impasse in negotiations when no impasse existed,
5. Withdrawing recognition and refusing to bargain with the BAEA,
6. Recognizing and negotiating with the BTA, and,

7. Making unilateral changes in working conditions that were items of negotiations before impasse existed.

The School District is ORDERED to take the following affirmative actions:

1. Attach the following statement to all bargaining unit individual teaching contracts signed during the 1978-79 school year. "This individual teaching contract is governed by and secondary to the master labor agreement in the areas of wages, hours, fringe benefits, and other conditions of employment. If any section of this individual teaching contract is inconsistent with the master labor agreement the master labor agreement is controlling." The School District is to allow at the reasonable times, any teacher or BAEA representative to inspect any or all individual teacher contracts.

2. Bargain with the BAEA in good faith upon reasonable demand,

3. Withdraw recognition from the BTA, set aside existing labor contract with the BTA and stop enforcing or maintaining the labor contract with the BTA, and,

4. Meet with the BAEA and attempt to fashion a remedy as required by the Board of Personnel Appeals order of February, 1979, and set forth in remedy section 2.

It is further ORDERED that all charges and motions not addressed in this recommended order are hereby dismissed.

Dated this 30th day of April, 1979.

Board of Personnel Appeals

By _____
Rick D. Hoogle
Hearing Examiner

NOTE: As stated in Board of Personnel Appeals rule 24.26.584 ARM Exceptions the parties shall have 20 days to file exceptions to this recommended order. If no exceptions are filed, this recommended order will become a FULL and FINAL ORDER of the Board of Personnel Appeals.